Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(i)-70–08 OF 2022(W), 02(i)-71–08 OF 2022(W), 02(i)-72–08 OF 2022(W), 02(i)-74–08 OF 2022(W) AND 01-(f)-1–01 OF 2023(B)

ABANG ISKANDAR PCA, ZABARIAH YUSOF, HASNAH HASHIM, HARMINDAR SINGH AND ABDUL KARIM FCJJ

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Contract — Sale and purchase of property ('SPA') — Liquidated ascertained damages ('LAD') — Late delivery of vacant possession and completion of common facilities — Developer varied prescribed completion period of project — Extension of time granted by Controller of Housing — Purchasers commenced proceedings against developer following Federal Court's decision in Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281 — Whether SPA which provided for period of completion of housing accommodation extended illegally under ultra vires reg 11(3) of Housing Development (Control and Licensing) Regulations 1989 ('HDR') should revert to three-year period as provided in standard Schedule H agreement — Whether cause of action for late delivery LAD shall accrue to purchaser upon expiry of three-year period — Whether limitation period of claim for late delivery LAD shall commence upon expiry of three-year period — When time for purchaser's claim for LAD started to run — Whether purchaser enjoyed benefit at expense of developer when developer required to pay additional LAD pursuant to statutory agreement prescribed under Schedule H of HDR having duly adhered to extended time period for delivery of vacant possession and completion of common facilities — Whether second actor theory applied where innocent third party had relief on earlier decision made by public authority which subsequently declared ultra vires – Whether doctrine of prospective overruling — Whether reliance test applied — Limitation Act 1953 s 6(1)(a)

In Appeal Nos 70 and 71, the appellant ie Obata-Ambak Holdings Sdn Bhd ('Obata') was the purchaser and owner of a condominium known as The Sentral Residences ('the project') while the respondent ie Prema Bonanza Sdn Bhd ('Prema') was the developer of the project. The project was governed by the Housing Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989 ('the HDR'). Thus, the agreement was to be executed with potential purchasers as prescribed under Schedule H of the HDR whereby the time for delivery of vacant possession and completion of common facilities was 36 months. Prema later applied for modification of the agreement to vary the prescribed completion period for the project from 36 months to 54 months pursuant to reg 11(3) of the HDR. The

extension of time ('EOT') was granted by the Controller of Housing ('Controller') two years before the execution of the sale and purchase agreement ('SPA') with the purchasers of the project. The amended approved provisions were as reflected in cll 25 and 27 of the SPA. Obata entered into the SPAs with the approved EOT on: (a) 24 July 2012 ('Suit 301'); (b) 28 October 2013 ('Suit 303'); and (c) 11 July 2012 and 18 July 2012 ('Suit 305'). After the Federal Court's decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee'), Obata commenced proceedings against Prema for the following reliefs: (i) a declaration that any letters given for EOT pursuant to reg 11(3) of the HDR to deliver vacant possession of the property to the plaintiffs and the completion of the common facilities from 36 months to 54 months were inconsistent with the decision of *Ang Ming Lee*; (ii) a declaration that the defendant was required to comply with and was bound to Schedule H of the HDR to deliver vacant possession to the plaintiff and to complete the common facilities in 36 months, calculated from the dates of the SPAs; and (iii) an order that the defendant pay liquidated ascertained damages ('LAD') for vacant possession of the property and common facilities. Obata applied to enter summary judgment against Prema pursuant to O 14 of the Rules of Court 2012 ('the ROC') in all the three suits. Subsequently, Prema filed an application under O 14A of the ROC. The High Court dismissed the summary judgment application and allowed the O 14A application with a consequential order that Obata's suit be struck out. The High Court distinguished *Ang Ming Lee* and the case before him and concluded that Obata's cause of action was statute-barred. Aggrieved, Obata appealed to the Court of Appeal but the appeal was dismissed. Hence, the appeals in Appeal Nos 70 and 71 with the following questions of law: (A) whether a SPA for a housing accommodation of a high rise building between a purchaser and a developer which provided for a period of completion of the housing accommodation extended illegally under the ultra vires reg 11(3) of the HDR should revert to the three-year period as provided in the standard Schedule H agreement; (B) whether the cause of action for the late delivery LAD shall accrue to the purchaser only upon the expiry of the three-year period; and (C) whether the limitation period of a claim for the late delivery LAD shall commence only upon the expiry of the three-year period. Appeal Nos 72 and 74 involved the same project as Obata. Prema who was the appellant in the appeal entered into a SPA with the respondent ie Vignesh Naidu a/l Kuppusamy Naidu ('Vignesh') for the purchase of a parcel of the project ('the property'). Upon the completion of the project, Prema gave a written notice to Vignesh on 25 January 2017 stating that the certificate of completion and compliance had been issued and vacant possession of the property was ready to be delivered. However, Vignesh claimed that the last date to deliver vacant possession was supposed to be on 17 July 2015 and Prema must be liable to pay Vignesh LAD for late delivery of vacant possession. Vignesh claimed that the SPA was not in the prescribed statutory form as mandated under the HDR.

A The SPA provided that the vacant possession of the property shall be delivered by the developer within 54 months and not 36 months from the date of the signing of the SPA as prescribed under Schedule H of the HDR. Vignesh sought the following reliefs from the High Court: (1) a declaration that any notice given in accordance to an EOT by virtue of reg 11(3) of the HDR for B Prema to deliver vacant possession of the property from 36 months to 54 months was invalid as in *Ang Ming Lee*; (2) a declaration that Prema was bound to deliver vacant possession to Vignesh within a period of 36 months in accordance with the statutory form from the date of the signing of the SPA; and (3) an order for Prema to pay LAD to Vignesh for late delivery of vacant C possession. Vignesh applied for summary judgment against Prema and Prema applied to strike out Vignesh's claim. The High Court dismissed the application by Vignesh and the claim was struck out. Aggrieved, Vignesh appealed and it was allowed the Court of Appeal. Hence, the appeals in Appeal Nos 72 and 74 with the following questions of law: (I) does the doctrine of D prospective overruling and the exceptions set out in *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209; [2005] UKHL 41 applied to Malaysian cases where a court's decision and/or judicial pronouncement would bring disruptive consequences to an industry as a whole; (II) does the reliance test (the greater the reliance on the E law or legal principle being overruled, the greater the need for prospective overruling) applied to Malaysian cases where great reliance was placed on a statutory regime; (III) when does time for a purchaser's claim for LAD started to run under s 6(1)(a) of the Limitation Act 1953 ('the LA') where: (a) a purchaser and a developer entered into a SPA prescribed by Schedule H of the F HDR; (b) the SPA expressly stated a time frame of more than 36 months for delivery of vacant possession under cl 25 and completion of common facilities under cl 27 ('extended period'); (c) the purchaser claimed that the extended period deviated from the 36 months prescribed by Schedule H of the HDR; and (d) the purchaser consequently claimed LAD from the developer for that G part of the extended period which exceeded 36 months; and (IV) whether a purchaser was to be taken to have enjoyed the benefit at the expense of a developer when the developer was required to pay additional LAD to the purchaser pursuant to the statutory agreement prescribed under Schedule H of the HDR having duly adhered to the extended time period for delivery of H vacant possession and completion of common facilities by the purchaser and the developer. In the last appeal ('Sri Damansara's appeal'), the appellant ie Sri Damansara Sdn Bhd ('Sri Damansara') was the developer of a condominium known as Foresta Damansara. The second respondent ie Fong Soo Ken ('Fong') had paid RM10,000 to Sri Damansara as part payment for the I purchase of a unit in the condominium costing RM735,980 (subsequently discounted with a rebate of RM63,598). Subsequently, Fong requested Sri Damansara to add the third respondent ie Yoa Kian How ('Yoa') as a co-purchaser of the unit. Sri Damansara later entered into SPA with both Fong and Yoa where it was agreed that: (i) Sri Damansara shall deliver vacant

possession of the unit to Fong and Yoa within 42 months from the date of the SPA; and (ii) by the terms of the SPA Sri Damansara shall complete the condominium's common facilities within 42 months from the date of the SPA. About 41 months 25 days from the date of the SPA, Sri Damansara gave Fong and Yoa a notice to take delivery of vacant possession of the unit. Fong and Yoa filed a claim at the first respondent ie the Homebuyers' Tribunal ('tribunal') for LAD amounting to RM44,279.78 for the delay in delivering vacant possession of the unit and completing the common facilities. They computed their claim based on the purchase price before the rebate and the 42 months period to start running from the date of their part payment of the purchase price and not from the date of the SPA. Sri Damansara counterclaimed for the return of the rebate. The tribunal adopted the calculation by Fong and Yoa and ordered Sri Damansara to pay them RM41,134.22 as LAD for late delivery of vacant possession of the unit only. Sri Damansara filed a judicial review application at the High Court against the tribunal's decision. The High Court allowed Sri Damansara's application in part and Sri Damansara was ordered to pay Fong and Yoa the sum of RM39,327.10 with interest. Aggrieved, Sri Damansara appealed but it was dismissed by the Court of Appeal. Hence, the Sri Damansara's appeal with the question of law ie whether the second actor theory as endorsed in *Regina (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2022] AC 461 had any application where an innocent third party had relief on an earlier decision made by the public authority which was subsequently declared ultra vires.

Held, dismissing Appeal Nos 70 and 71; and allowing Appeal Nos 72 and 74 and Sri Damansara's appeal:

(1) In the appeals of Obata and Vignesh, the issue to be determined was when the cause of action arose ie whether the cause of action arose after the decision of *Ang Ming Lee* or within six years after the execution of the SPAs. Obata and Vignesh were challenging the validity of cll 25 and 27 of the SPA ie terms which they had agreed to when they signed the SPAs in 2012. In respect of limitation, based on the law on limitation it was clear that time began to run at the earliest point of time Obata and Vignesh could commence action. The causes of action were based on contract and s 6(1) of the LA required civil claim to be filed before the expiration of six years from the date on which the cause of action accrued which would be the date the SPAs were executed. Both Obata and Vignesh executed the SPAs with the knowledge that the completion period of the house project was 54 months. Obata and Vignesh could have and should have raised the issue of the validity of the clauses in the SPAs before signing the full and final settlement in 2017 which they failed to. Both the actions were filed in 2020, that was outside the period of limitation. A claim for LAD where the cause of action accrued beyond six years before *Ang Ming Lee*,

the claim was time barred. The claims were barred by limitation, as the six-year period had expired. Therefore, Obata's and Vignesh's claims must necessarily fail. The questions (i)–(iii) posed in Appeal Nos 70 and 71 were answered in the negative. In respect of limitation the questions posed in Appeal Nos 72 and 74 were answered as follows: (i) for question (iii), the cause of action accrued when there was a breach of terms stipulated in the SPA. The SPA executed and accepted by the purchaser expressly stated that the delivery of vacant possession was 54 months. There was no breach of the terms of the SPA; and (ii) question (iv) was answered in the affirmative (see paras 86, 96 & 98–102).

(2) In the appeal of Sri Damansara, the first act was the approval of the EOT by the Controller while the second act was the reliance of the developer on the Controller's extension. The validity of an administrative action may, in exceptional circumstances, be challenged by way of collateral proceedings. However, the second and third respondents were in actual fact 'strangers' and as 'strangers' they were not eligible to collaterally attack the Controller's extension through this proceeding. The proper parties were the Controller who performed the administrative action and Sri Damansara who relied on the administrative decision. The second and third respondents as the purchasers did not fall within the categories of parties entitled to initiate collateral proceedings to invalidate the Controller's extension. Moreover, the collateral proceeding could only be used as a defence rather than an attack. Hence, the second and third respondents could not initiate this collateral proceeding, as they were using it as an attack against Sri Damansara (who was the developer and the second actor) as opposed to a defence. There was no direct challenge against the Controller's decision to grant the extension by way of judicial review. Thus, it shall not render the second act invalid as there was reliance on the validity of the first act when the second act was performed. Despite the extension having been declared unlawful and invalid by *Ang Ming Lee,* it should not adversely affect the parties who had relied on that decision or regulation prior to the declaration of invalidity. The Controller had considered the application for extension and granted the extension as the law at that time was valid. The developer had relied on the decision of the Controller who had granted the extension. Accordingly, the second actor theory applied. The question posed in Sri Damansara's appeal was therefore answered in the affirmative (see paras 129–132, 134 & 136).

(3) The Federal Court in *Ang Ming Lee* having ruled that reg 11 of the HDR was ultra vires, did not address or discuss the issue whether such ruling applied prospectively or retrospectively. Nor whether by virtue of the declaration of the reg 11(3) of the HDR ultra vires, that all extensions granted by the Controller before *Ang Ming Lee* were invalid. If *Ang Ming Lee* was to have retrospective effect there would be serious ramifications

and repercussions to the housing developers that had placed reliance on the existing laws and diligently complied with the laws which were at that time valid. Therefore, the decision of *Ang Ming Lee* was prospective. Thus, the principles enunciated in *Ang Ming Lee* would not apply to extensions granted by the Controller before *Ang Ming Lee*. The questions on prospective overruling posed in question (i) and (ii) in Appeal Nos 72 and 74 were answered in the affirmative (see paras 137 & 167–169).

(4) The purchasers ie Obata and Vignesh as house buyers were fully aware of the terms of SPAs with the extended period with no objection, and had benefited as vacant possession delivered and, LAD payment was accepted. The developers ie Prema complied with the provisions of the law at that time and had not acted in any way unconscionably to the detriment of the interest of the purchasers. It was only after *Ang Ming Lee* that the claims were filed years after delivery of vacant possession and payment of LAD. In the same vein, the same principles applied to Sri Damansara. Fong and Yoa shall not be entitled to remedies due to inequitable conduct of unconscionability, unjust enrichment and estoppel. There would be injustice if the claims for LAD were allowed to be calculated retrospectively (see paras 175–177).

[Bahasa Malaysia summary

Dalam Rayuan No 70 dan 71, perayu iaitu Obata-Ambak Holdings Sdn Bhd ('Obata') adalah pembeli dan pemilik satu kondominium yang dikenali sebagai The Sentral Residences ('projek'), manakala responden iaitu Prema Bonanza Sdn Bhd ('Prema') adalah pemaju projek tersebut. Projek tersebut ditadbir oleh Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 dan Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ('HDR'). Oleh itu, perjanjian akan dilaksanakan dengan bakal pembeli seperti yang ditetapkan di bawah Jadual H HDR di mana tempoh untuk penyerahan milikan kosong dan penyiapan kemudahan awam adalah 36 bulan. Prema kemudiannya memohon untuk pengubahsuaian perjanjian untuk mengubah tempoh penyiapan yang ditetapkan untuk projek dari 36 bulan kepada 54 bulan menurut peraturan 11(3) HDR. Tempoh lanjutan masa ('EOT') telah diberikan oleh Pengawal Perumahan ('Pengawal') dua tahun sebelum pelaksanaan perjanjian jual beli ('SPA') dengan pembeli projek. Peruntukan yang diluluskan yang dipinda adalah seperti yang dinyatakan dalam klausa 25 dan 27 SPA. Obata telah menandatangani SPA dengan EOT yang diluluskan pada: (a) 24 Julai 2012 ('Saman 301'); (b) 28 Oktober 2013 ('Saman 303'); dan (c) 11 Julai 2012 dan 18 Julai 2012 ('Saman 305'). Selepas keputusan Mahkamah Persekutuan dalam kes *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee'), Obata telah memulakan prosiding terhadap Prema untuk relif berikut: (i) satu pengisytiharan bahawa mana-mana surat yang diberikan untuk EOT menurut peraturan 11(3) HDR

untuk menyerahkan milikan kosong hartanah kepada plaintif dan penyiapan kemudahan awam dari 36 bulan kepada 54 bulan adalah tidak konsisten dengan keputusan *Ang Ming Lee*; (ii) satu pengisytiharan bahawa defendan dikehendaki untuk mematuhi dan terikat kepada Jadual H HDR untuk menyerahkan milikan kosong kepada plaintif dan menyiapkan kemudahan awam dalam tempoh 36 bulan, yang diambil kira dari tarikh SPA; dan (iii) satu perintah bahawa defendan membayar ganti rugi dipastikan ('LAD') untuk milikan kosong hartanah dan kemudahan awam. Obata memohon untuk memasukkan penghakiman ringkas terhadap Prema menurut A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') dalam semua tiga saman tersebut. Kemudian, Prema telah memfailkan permohonan di bawah A 14A KKM. Mahkamah Tinggi menolak permohonan penghakiman ringkas dan membenarkan permohonan A 14A dengan perintah turutan bahawa saman Obata dibatalkan. Mahkamah Tinggi membezakan antara *Ang Ming Lee* dan kes di hadapannya dan menyimpulkan bahawa kausa tindakan Obata dihalang had masa. Terkilan, Obata merayu kepada Mahkamah Rayuan tetapi rayuan ditolak. Oleh itu, rayuan dalam Rayuan No 70 dan 71 dengan soalan undang-undang berikut: (A) sama ada SPA untuk penyelesaian perumahan bangunan tinggi antara pembeli dan pemaju yang memperuntukkan tempoh penyiapan penyelesaian perumahan yang dilanjutkan secara tidak sah di bawah ultra vires peraturan 11(3) HDR harus kembali kepada tempoh tiga tahun seperti yang ditetapkan dalam perjanjian standard Jadual H; (B) sama ada kausa tindakan untuk LAD serahan lewat akan terakru kepada pembeli setelah tamatnya tempoh tiga tahun; dan (C) sama ada tempoh had masa untuk tuntutan LAD serahan lewat hanya akan bermula setelah tamatnya tempoh tiga tahun. Rayuan No 72 dan 74 melibatkan projek yang sama dengan Obata. Prema, yang merupakan perayu dalam rayuan telah menandatangani SPA dengan responden iaitu Vignesh Naidu a/l Kuppusamy Naidu ('Vignesh') untuk pembelian satu petak projek tersebut ('hartanah'). Setelah siapnya projek tersebut, Prema memberikan notis bertulis kepada Vignesh pada 25 Januari 2017 menyatakan bahawa sijil penyiapan dan pematuhan telah dikeluarkan dan milikan kosong hartanah tersebut sedia untuk diserahkan. Namun, Vignesh mendakwa bahawa tarikh akhir untuk serahan milikan kosong sepatutnya pada 17 Julai 2015 dan Prema mesti bertanggungjawab membayar kepada Vignesh LAD untuk serahan lewat milikan kosong. Vignesh mendakwa bahawa SPA tidak mengikut bentuk perundangan yang ditetapkan seperti yang dimandatkan di bawah HDR. SPA meyatakan bahawa milikan kosong hartanah hendaklah diserahkan oleh pemaju dalam tempoh 54 bulan dan bukan 36 bulan dari tarikh pemeteraian SPA seperti yang ditetapkan di bawah Jadual H HDR. Vignesh memohon relif berikut di Mahkamah Tinggi: (1) satu pengisytiharan bahawa sebarang notis yang diberikan menurut EOT berdasarkan peraturan 11(3) HDR untuk Prema menyerahkan milikan kosong hartanah dari 36 bulan kepada 54 bulan adalah tidak sah seperti dalam kes *Ang Ming Lee*; (2) satu pengisytiharan bahawa Prema terikat menyerahkan milikan kosong kepada Vignesh dalam tempoh 36 bulan selaras dengan bentuk

perundangan dari tarikh pemeteraian SPA; dan (3) satu perintah agar Prema membayar LAD kepada Vignesh atas kelewatan serahan milikan kosong. Vignesh memohon penghakiman ringkas terhadap Prema dan Prema memohon untuk membatalkan tuntutan Vignesh. Mahkamah Tinggi menolak permohonan Vignesh dan tuntutan tersebut dibatalkan. Tidak berpuas hati, Vignesh merayu dan dibenarkan oleh Mahkamah Rayuan. Oleh itu, rayuan dalam Rayuan No 72 dan 74 dengan soalan undang-undang berikut: (I) adakah doktrin penolakan prospektif dan pengecualian yang ditetapkan dalam *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209; [2005] UKHL 41 terpakai kepada kes Malaysia di mana keputusan mahkamah dan/atau pengisytiharan kehakiman akan membawa akibat yang mengganggu kepada keseluruhan industri; (II) adakah ujian pergantungan (semakin tinggi pergantungan pada undang-undang atau prinsip perundangan yang ditolak, semakin besar keperluan untuk penolakan prospektif) terpakai kepada kes Malaysia di mana pergantungan besar diletakkan pada rejim perundangan; (III) bilakah masa untuk tuntutan pembeli bagi LAD bermula di bawah s 6(1)(a) Akta Had Masa 1953 ('AHM') di mana: (a) pembeli dan pemaju menandatangani SPA yang ditetapkan oleh Jadual H HDR; (b) SPA dengan jelas menyatakan tempoh masa lebih daripada 36 bulan untuk serahan milikan kosong di bawah klausa 25 dan penyiapan kemudahan awam di bawah klausa 27 ('tempoh lanjutan'); (c) pembeli mendakwa bahawa tempoh lanjutan menyimpang dari 36 bulan yang ditetapkan oleh Jadual H HDR; dan (d) pembeli akibatnya menuntut LAD daripada pemaju untuk bahagian tempoh lanjutan yang melebihi 36 bulan; dan (IV) sama ada pembeli dianggap telah menikmati faedah dengan menjejaskan pemaju apabila pemaju dikehendaki membayar LAD tambahan kepada pembeli menurut perjanjian statutori yang ditetapkan di bawah Jadual H HDR yang telah mematuhi tempoh lanjutan untuk serahan milikan kosong dan penyiapan kemudahan awam oleh pembeli dan pemaju. Dalam rayuan terakhir ('rayuan Sri Damansara'), perayu iaitu Sri Damansara Sdn Bhd ('Sri Damansara') adalah pemaju sebuah kondominium yang dikenali sebagai Foresta Damansara. Responden kedua iaitu Fong Soo Ken ('Fong') telah membayar RM10,000 kepada Sri Damansara sebagai bayaran pendahuluan untuk pembelian satu unit di kondominium yang bernilai RM735,980 (kemudian diskaun dengan rebat sebanyak RM63,598). Setelah itu, Fong meminta Sri Damansara untuk menambah responden ketiga iaitu Yoa Kian How ('Yoa') sebagai pembeli bersama untuk unit tersebut. Sri Damansara kemudian menandatangani SPA dengan Fong dan Yoa di mana ia dipersetujui bahawa: (i) Sri Damansara akan menyerahkan milikan kosong unit kepada Fong dan Yoa dalam tempoh 42 bulan dari tarikh SPA; dan (ii) menurut terma SPA, Sri Damansara akan menyiapkan kemudahan awam kondominium dalam tempoh 42 bulan dari tarikh SPA. Kira-kira 41 bulan 25 hari dari tarikh SPA, Sri Damansara memberi notis kepada Fong dan Yoa untuk mengambil serahan milikan kosong unit. Fong dan Yoa telah memfailkan tuntutan di responden pertama iaitu Tribunal Tuntutan Pembeli

A Rumah ('tribunal') untuk LAD berjumlah RM44,279.78 atas kelewatan serahan milikan kosong unit dan penyiapan kemudahan awam. Mereka mengira tuntutan mereka berdasarkan harga pembelian sebelum rebat dan tempoh 42 bulan yang bermula dari tarikh bayaran pendahuluan mereka bagi harga pembelian dan bukannya dari tarikh SPA. Sri Damansara membuat B tuntutan balas untuk pemulangan rebat tersebut. Tribunal menerima pengiraan oleh Fong dan Yoa dan memerintahkan Sri Damansara untuk membayar mereka RM41,134.22 sebagai LAD untuk kelewatan serahan milikan kosong unit sahaja. Sri Damansara memfailkan permohonan semakan kehakiman di Mahkamah Tinggi terhadap keputusan tribunal. Mahkamah C Tinggi membenarkan sebahagian permohonan Sri Damansara dan Sri Damansara diperintahkan untuk membayar Fong dan Yoa sejumlah RM39,327.10 berserta faedah. Terkilan, Sri Damansara mengemukakan rayuan tetapi ia ditolak oleh Mahkamah Rayuan. Oleh itu, rayuan Sri Damansara dengan soalan undang-undang iaitu sama ada teori pelaku kedua D yang disokong dalam *Regina (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2022] AC 461 mempunyai sebarang aplikasi di mana pihak ketiga yang tidak bersalah telah mendapat relif daripada keputusan awal yang dibuat oleh pihak E berkuasa awam yang kemudiannya diisytihar ultra vires.

Diputuskan, menolak Rayuan No 70 dan 71; dan membenarkan Rayuan No 72 dan 74 dan rayuan Sri Damansara:

F (1) Dalam rayuan Obata dan Vignesh, isu yang perlu ditentukan adalah bila kausa tindakan timbul iaitu sama ada kausa tindakan timbul selepas keputusan *Ang Ming Lee* atau dalam tempoh enam tahun selepas pelaksanaan SPA. Obata dan Vignesh mencabar kesahihan klausa 25 dan 27 SPA iaitu terma yang mereka persetujui dengan apabila menandatangani SPA pada tahun 2012. Mengenai had masa, G berdasarkan undang-undang mengenai had masa adalah jelas bahawa masa untuk memulakan tindakan bermula dari titik terawal di mana Obata dan Vignesh boleh memulakan tindakan. Kausa tindakan adalah berdasarkan kontrak dan s 6(1) AHM memerlukan tuntutan sivil difailkan sebelum tamatnya enam tahun dari tarikh kausa tindakan H timbul, yang mana tarikh tersebut adalah apabila SPA dilaksanakan. Kedua-dua Obata dan Vignesh telah menandatangani SPA dengan pengetahuan bahawa tempoh penyiapan projek rumah adalah 54 bulan. Obata dan Vignesh seharusnya telah membangkitkan isu mengenai kesahihan klausa dalam SPA sebelum menandatangani penyelesaian I penuh dan akhir pada tahun 2017, yang mana mereka gagal untuk lakukan. Kedua-dua tindakan difailkan pada tahun 2020, iaitu di luar tempoh had masa. Tuntutan untuk LAD di mana kausa tindakan timbul lebih dari enam tahun sebelum *Ang Ming Lee*, tuntutan tersebut adalah terhad oleh waktu. Tuntutan tersebut dihadkan oleh had masa, kerana

tempoh enam tahun telah berlalu. Oleh itu, tuntutan Obata dan Vignesh adalah gagal. Soalan (i)–(iii) yang dikemukakan dalam Rayuan No 70 dan 71 dijawab dengan negatif. Mengenai had masa, soalan yang dikemukakan dalam Rayuan No 72 dan 74 dijawab seperti berikut: (i) untuk soalan (iii), kausa tindakan timbul apabila terdapat pelanggaran terma yang ditetapkan dalam SPA. SPA yang dilaksanakan dan diterima oleh pembeli secara jelas menyatakan bahawa serahan milikan kosong adalah dalam tempoh 54 bulan. Tiada pelanggaran terma SPA; dan (ii) soalan (iv) dijawab dengan positif (lihat perenggan 86, 96 & 98–102).

(2) Dalam rayuan Sri Damansara, tindakan pertama adalah kelulusan EOT oleh Pengawal manakala tindakan kedua adalah kebergantungan pemaju kepada lanjutan yang diberikan oleh Pengawal. Kesahihan tindakan pentadbiran boleh, dalam keadaan yang luar biasa, dicabar melalui prosiding kolateral. Walau bagaimanapun, responden kedua dan ketiga sebenarnya adalah 'orang asing' dan sebagai 'orang asing', mereka tidak layak untuk menyerang secara kolateral lanjutan Pengawal melalui prosiding ini. Pihak yang betul adalah Pengawal yang menjalankan tindakan pentadbiran dan Sri Damansara yang bergantung pada keputusan pentadbiran. Responden kedua dan ketiga sebagai pembeli tidak termasuk dalam kategori pihak yang berhak untuk memulakan prosiding kolateral bagi membatalkan lanjutan Pengawal. Selain itu, prosiding kolateral hanya boleh digunakan sebagai pembelaan dan bukannya serangan. Oleh itu, responden kedua dan ketiga tidak dapat memulakan prosiding kolateral ini, kerana mereka menggunakannya sebagai serangan terhadap Sri Damansara (yang merupakan pemaju dan pelaku kedua) dan bukannya sebagai pembelaan. Tiada cabaran langsung terhadap keputusan Pengawal untuk memberikan lanjutan melalui semakan kehakiman. Oleh itu, ia tidak akan membatalkan tindakan kedua kerana terdapat kebergantungan pada kesahihan tindakan pertama semasa tindakan kedua dilaksanakan. Walaupun lanjutan tersebut telah diisytiharkan tidak sah oleh *Ang Ming Lee*, ia tidak seharusnya memberi kesan negatif kepada pihak-pihak yang telah bergantung pada keputusan atau peraturan tersebut sebelum pengisytiharan tidak sah itu. Pengawal telah mempertimbangkan permohonan untuk lanjutan dan memberikan lanjutan kerana undang-undang pada waktu itu adalah sah. Pemaju telah bergantung pada keputusan Pengawal yang telah memberikan lanjutan tersebut. Oleh itu, teori pelaku kedua terpakai. Soalan yang dikemukakan dalam rayuan Sri Damansara telah dijawab dengan positif (lihat perenggan 129–132, 134 & 136).

(3) Mahkamah Persekutuan dalam *Ang Ming Lee* yang memutuskan bahawa peraturan 11 HDR adalah ultra vires, tidak membincangkan isu sama ada keputusan tersebut berlaku secara prospektif atau retrospektif. Begitu

juga, tidak dibincangkan sama ada disebabkan oleh pengisytiharan peraturan 11(3) HDR yang ultra vires, semua lanjutan yang diberikan oleh Pengawal sebelum kenyataan dalam *Ang Ming Lee* adalah tidak sah. Jika *Ang Ming Lee* berlaku secara retrospektif, ia akan memberikan kesan yang serius kepada pemaju perumahan yang telah bergantung pada undang-undang sedia ada dan mematuhi undang-undang yang sah pada waktu itu. Oleh itu, keputusan dalam kes *Ang Ming Lee* dianggap prospektif. Dengan itu, prinsip-prinsip yang dinyatakan dalam kes *Ang Ming Lee* tidak akan terpakai kepada lanjutan yang diberikan oleh Pengawal sebelum kes *Ang Ming Lee*. Soalan mengenai penolakan prospektif yang dikemukakan dalam soalan (i) dan (ii) dalam Rayuan No 72 dan 74 telah dijawab dengan positif (lihat perenggan 137 & 167–169).

(4) Pembeli iaitu Obata dan Vignesh sebagai pembeli rumah merupakan pihak yang sepenuhnya menyedari terma-terma SPA dengan tempoh lanjutan tanpa bantahan, dan telah mendapat manfaat apabila milikan kosong diserahkan dan pembayaran LAD diterima. Pemaju iaitu Prema mematuhi peruntukan undang-undang pada waktu itu dan tidak bertindak dengan cara yang tidak adil yang merugikan kepentingan pembeli. Hanya selepas kes *Ang Ming Lee* barulah tuntutan dibuat bertahun-tahun selepas serahan milikan kosong dan pembayaran LAD. Dalam konteks yang sama, prinsip yang sama terpakai kepada Sri Damansara. Fong dan Yoa tidak berhak kepada remedi disebabkan oleh tindakan tidak adil, pengayaan tidak adil dan estopel. Akan ada ketidakadilan jika tuntutan untuk LAD dibenarkan untuk dikira secara retrospektif (lihat perenggan 175–177).]

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H of Appeal, Putrajaya)

Low Joo Hean (with Chan Kim Weng and Kuan Jia Yin) (Ching, Tan & Assoc) in Civil Appeal Nos 02(i)-70–08 of 2022(W) and 02(i)-71–08 of 2022(W) for the appellant.
I *Lai Chee Hoe (with Ooi Xin Yi and Angeline Ang Mei Fong) (Chee Hoe & Assoc) in Civil Appeal Nos 02(i)-72–08 of 2022(W) and 02(i)-74–08 of 2022(W) for the appellant.*
Lim Chee Wee (with Raphael Kok Chi Ren, Dhiren Rene Norendra, Saroop Rampal, Aimi Dalila bt Ermal Aswardy and Emily Ho) (Norendra & Yap) in

Civil Appeal No 01-(f)-1–01 of 2023(B) for the appellant.
Lai Chee Hoe (with Ooi Xin Yi and Angeline Ang Mei Fong) (Chee Hoe & Assoc) in Civil Appeal Nos 02(i)-70–08 of 2022(W) and 02(i)-71–08 of 2022(W) for the respondent.
KL Wong (with Wong Renn Xin) (KL Wong) in Civil Appeal Nos 02(i)-72–08 of 2022(W) and 02(i)-74–08 of 2022(W) for the respondent.
The first respondent in Civil Appeal No 01(f)-1–01 of 2023(B) not represented.
KL Wong (with Wong Renn Xin and Adriadne Lee Pei Pei) (KL Wong) in Civil Appeal No 01(f)-1–01 of 2023(B) for the second and third respondents.
Liew Horng Bin (with Rahazlan Affandi Abdul Rahim) (Senior Federal Counsel) amicus curaie for Attorney General's Chambers.
Jadadish Chandra (with Jagshey Pipariya) (Arbain & Co) watching brief for Choy May May and 15 others.
Lam Wai Loon (with Thoo Yee Huan, Ankit R Sanghvi and Chong Lee Hui) (Halim Hong & Quek) watching brief for Persatuan Pemaju Hartanah dan Perumahan Malaysia (REHDA).
Aik Yin Chien (with Ho Chan Chon) (Izad Kazran & Co) watching brief for Country Garden Danga Bay Sdn Bhd.
Pretam Singh a/l Darshan Singh (with Rajasegaran a/l M Karuppiah and Kalvinder Singh Bath) (Pretam Singh, Nor & Co) watching brief for Amona Metro Development Sdn Bhd.
Joseph Khor (with Jasmine Wee) (Mah Weng Kwai & Assoc) watching brief for UPE Bangsar South Development (JV) SB.
James Ee (with Emily Hiew) (KF EE & Co) watching brief for Lim Biiang Haur vs Platinum Sdn Bhd.
Muhammad Asyraf Abd Aziz (with Nik Mohammad Syakhir bin Mohd Yasin and Kavyaasrini a/p S Mahendran) (Zain Megat & Murad) watching brief for parties with liquidated ascertained damages (LAD) claims.
Christine Toh (with Ryan Cheong) (Christine Toh & Co) watching brief for Kepong Industrial Park Sdn Bhd.
Yip Huen Weng (with Simon Hong Cheong King and Pearly Chua Li May) (Josephine, L K Chow & Co) watching brief for the Court of Appeal involving purchasers with LAD claims against developers.
Lee Khai (with Han Chin Ling, Teh Chiew Yin, Lee Kok Hao and Nicole Koh Sui Fen) (Ong and Manecksha) watching brief for Aspen vision City Sdn Bhd.
Viola Lettice De Cruz (with Koh Kean Kang and Albert Soo Kim Yan) (KY Soo) watching brief for the National House Buyer Association.
Lim Kien Huat (Lee & Lim) watching brief for the purchasers/homeowners in the Court of Appeals against Prema Bonanza Sdn Bhd.
Nurin Jazlina Ghazali (with Harnesh Pal Singh) (Lui & Bhullar) watching brief for the session court cases to Court of Appeal for the purchasers.
Caroline Lim Seah Le (Justine Voon Chooi & Wing) watching brief for the sessions court cases to Court of Appeal for the developers.
Ryan Sim Sze Ern (Gazel Chen & Partners) watching brief for the High Court and Court of Appeal cases involving the same issues.

Nandhini Devi (Nandhini Devi) watching brief for Skypark.

Hasnah Hashim FCJ:

INTRODUCTION

[1] There are five appeals which were heard together given the commonality of issues in the questions of law raised for our determination. One appeal was filed by the purchaser of the condominium units, The Sentral Residences. The other appeals are appeals filed by the developers of the projects, Prema Bonanza Sdn Bhd (Prema) and Sri Damansara Sdn Bhd (Sri Damansara). The appeals were heard together despite there being different parties involved. We heard oral submissions by all learned counsels representing the respective parties and at the end of those submissions we indicated that we needed time to consider the respective submissions. We have now reached our decision and what follows below are our deliberations on the issues raised and our reasons as to why we have so decided.

[2] The central issue in all the appeals concerns the payment of liquidated ascertained damages (LAD) as a result of this court's decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 (*Ang Ming Lee*) declaring that reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR') is the parent Act.

APPEAL NOS 02(i)-70–08 OF 2022 (W) ('APPEAL NO 70') AND 02(i)-71–08 OF 2022 (W) ('APPEAL NO 71'): OBATA-AMBAK HOLDINGS SDN BHD ('OBATA') V PREMA BONANZA SDN BHD ('PREMA')

[3] Both appeals have identical issues, with similar facts and arose from the same development project. Appeal No 70 is an appeal by Obata against the decision of the Court of Appeal dismissing the appeal by Obata against the High Court's decision which allowed Prema's application under O 14A of the Rules of Court 2012 ('the ROC'). Whereas Appeal No 71 is an appeal by Obata against the Court of Appeal's decision which dismissed Obata's application for summary judgment under O 14 of the ROC 2012.

[4] The appellant, Obata is the purchaser and owner of a condominium known as The Sentral Residences ('the project'). The respondent, Prema is the developer of the project. The Project comprises of two towers of service apartments and was governed by the Housing Development (Control and Licensing) Act 1966 ('the HDA') and the HDR. Thus, the agreement was to be executed with potential purchasers as prescribed under Schedule H of HDR

whereby the time for delivery of vacant possession and completion of common facilities is 36 months.

[5] However, due to the magnitude and the peculiarity of the bespoke design of the project, Prema applied for modification of the prescribed agreement to vary the prescribed completion period for the project from 36 months to 54 months pursuant to reg 11(3) of the HDR. The extension of time ('EOT') was granted by the Controller of Housing ('the Controller') on *16 December 2010*, two years before the execution of the SPA with the purchasers of the project. Prema obtained EOT to extend the time period for delivery of vacant possession and completion of common facilities from 36 months to 54 months. The amended approved provisions are as reflected in cll 25 and 27 of the sale and purchase agreements ('SPA'). It was only after procuring the approval of the EOT and the amended clauses in the SPA that Prema executed the SPAs with its purchasers.

[6] Obata entered into the SPAs with the approved EOT on various dates which formed the subject matter before the court, namely:

(a) SPA dated *24 July 2012* (Suit 301);

(b) SPA dated *28 October 2013* (Suit 303); and

(c) SPA dated *11 July 2012* and *18 July 2012* (Suit 305) — the present appeals before us.

[7] After the Federal Court's decision of *Ang Ming Lee*, Obata commenced proceedings against Prema for the following reliefs:

(a) a declaration that any letters given for extension of time pursuant to reg 11(3) of the HDR to deliver vacant possession of the property to the plaintiffs and the completion of the common facilities from 36 months to 54 months ultra vires were inconsistent with the decision of *Ang Ming Lee*;

(b) a declaration that the defendant was required to comply with and was bound to Schedule H of the HDR to deliver vacant possession to the plaintiff and complete the common facilities in 36 months, calculated from the dates of the SPAs; and

(c) an order that the defendant pay liquidated ascertained damages for vacant possession of the property and common facilities in the amount of RM684,953.42, RM307,035.61 and RM55,230.90 for Suits 305, 301 and 303, respectively with 5% interests.

[8] Obata applied to enter summary judgment against Prema pursuant to O 14 of the Rules of Court 2012 ('the ROC') in all the three suits. Despite the

court directing for an O 14A application to be filed, Prema proceeded to file an application to strike out Obata's suits.

[9] Subsequently, Prema filed an application under O 14A. The legal issues for determination under O 14A were as follows:

(a) whether Prema was allowed to deviate from the terms of the prescribed contract of sale in Schedule H of the HDR;

(b) whether a Minister, who is empowered to regulate and prohibit the conditions and terms of any contract between a licensed housing developer and his purchaser, could delegate the exercise of such powers or the performance of such duties to the Controller of Housing;

(c) whether the decision of *Ang Ming Lee* has a retrospective effect;

(d) whether commencing the suit through a writ action to claim LAD before challenging the EOT was granted, an abuse of court process;

(e) whether Obata is allowed to commence the suit through a writ instead of a judicial review;

(f) whether the cause of action claimed by Obata accrued from the date of the SPA;

(g) whether limitation period had set in; and

(h) whether the Obata was estopped from claiming LAD after signing of the settlement letters.

THE HIGH COURT

[10] On 18 May 2021, the High Court after hearing the arguments of the parties, dismissed the Summary Judgment application and allowed the O 14A application with a consequential order that Obata's writ and statement of claim be struck out with costs of RM5,000.

[11] The High Court made, inter alia, the following findings:

(a) a developer such as Prema is not allowed to deviate from the terms of the prescribed contract of sale in Schedule H. A Minister who is empowered to regulate and prohibit the conditions and terms of any contract between a licensed housing developer and his purchaser, could not delegate the exercise of such powers or the performance of such duties to the Controller of Housing, as was clearly answered in the negative in *Ang Ming Lee*. Pursuant to the doctrine of stare decisis, the ratio in *Ang Ming Lee* was binding on the court. Despite answering the above in the negative;

(i) at the time the development was launched, *Ang Ming Lee* was not yet decided. The only way a developer could obtain an extension of time to handover vacant possession was by applying to the Minister pursuant to reg 11(3) of the HDR;

(ii) when the SPAs were signed in 2012 and 2013, respectively, the defendant had already obtained approval from the Housing Controller to complete the handing over of the parcels concerned to its purchasers, including the plaintiffs; and

(iii) the notion that Prema was wrong to deviate from the prescribed Schedule H only came in the year 2020 which was about eight years later from the date the defendant received the approval from the Housing Controller and about four years after the defendant entered into a settlement agreement with the plaintiffs on the LAD.

[12] The High Court judge opined that as a general rule, a written judgment has retrospective effect save for situations where the doctrine of prospective overruling is applied. However, this did not mean that Obata were entitled to succeed in their suit against Prema. It was argued by Obata that they had no knowledge of the EOT as Prema did not extend a copy of the EOT to the prospective purchasers.

[13] In its statement of claim, Obata pleaded that the SPA signed by the parties was in breach of Schedule H of the HDR as the time period for delivery of vacant possession had been varied from 36 months to 54 months. It was evident that Obata had knowledge of the 54 months being the time period of delivery of vacant possession and the completion of common facilities.

[14] The learned High Court judge concluded that Obata's contention that no obligation could be imposed on the purchasers to file a judicial review application as the EOT was not provided to them did not hold water. The predominant and sole subject matter of the Obata's suits is premised on the validity of the EOT. The same was within the sphere of public law which was challenged by Obata and the EOT being a decision granted by the Ministry of Housing and Local Government could only be challenged by way of a judicial review and not a writ action. Obata's conduct in filing this suit was improper and an abuse of court process. In a situation where a litigant uses the court's machinery improperly, the court is vested with ample powers to strike out an irregular proceeding.

[15] A party who wishes to enforce its rights has to do so within time. The cause of action for a contract accrued from the date of its breach and time begins to run from that breach. Obata's claims, which were filed on 18 June 2020, were time-barred given that the breach as alleged occurred as early as

24 June 2012 (Suit 301), 28 October 2013 (Suit 303) and 11 July 2012 and 18 July 2012 (Suit 305). The six years' time limitation had therefore set in to bar Obata's claims. In so far as the declaratory orders sought, Obata was clearly out of time given that a judicial review application must be filed within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant in line with O 53 r 3(6) of the ROC.

[16] There was no full contracting out of the signed SPA given that Obata was entitled to, if not had been duly compensated based on the terms of the signed SPAs. It could not be said that the settlement agreements were of no legal effect on the basis that they diminished or took away the statutory rights of the house buyers.

[17] Obata, being the party entitled to enforce its rights of LAD, have the option either to refuse the amount offered, treat the terms as being breached and forthwith sue for damages. On the other hand, it may acquiesce to the purported breach and treat the SPA as continuing. If they elect to take this course of action, Obata was barred from pursuing any remedy. Ipso facto, the doctrine of estoppel applied in Suits 301 and 305. The settlement agreements signed by Obata were conclusive proof of the terms which they have settled upon. Neither of them would be allowed to go back to the assumption when it would be unfair or unjust to allow them to do so. Waiver of rights was the direct result of the settlement letters signed by the plaintiffs in Suit 301 and Suit 305.

THE COURT OF APPEAL

[18] Aggrieved with the decision of the High Court, Obata appealed to the Court of Appeal. Having heard the arguments advanced by the parties, the Court of Appeal agreed with the High Court and dismissed both appeals with costs of RM8,000. The reasons given by the Court of Appeal are as follows:

(a) when the SPAs were executed, both cll 25 and 27 in the SPAs stipulated expressly that vacant possession shall be delivered within 54 months from the date of the signing of the SPAs. Obata challenged the validity of both cll 25 and 27 of the SPAs, from the date of the signing/execution of the SPAs. This challenge was premised on a breach of Schedule H; and

(b) the contractual breach which Obata complained of was the purported amendment of both cll 25 and 27 of the SPAs. Since Obata challenged both cll 25 and 27 of the SPAs from the date of the inception or execution of the SPAs, then the cause of action must necessarily run from the date of the execution of the SPAs that was, on 11 July 2012 and 18 July 2012 respectively. Therefore, Obata's claim was barred by limitation, as the six year period had expired on 10 July 2018 and 17 July 2018 respectively.

Since the suit was filed on 18 June 2020, limitation had already set in. On this ground alone, the appeals were dismissed.

[19] For these two appeals leave was granted for the following questions of law:

Q1: Whether a sale and purchase agreement for a housing accommodation of a high rise building between a purchaser and a developer which provides for a period for completion of the housing accommodation extended illegally under the ultra vires reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 should revert to the three-year period as provided in the standard Schedule H agreement?

If the above is answered in the affirmative,

Q2: Whether the cause of action for the late delivery liquidated damages shall accrue to the purchaser only upon expiry of the said three-year period?

And if Question 2 is also answered in the affirmative,

Q3: Whether the limitation period of a claim for the late delivery liquidated damages shall commence only upon the expiry of the said three-year period?

APPEAL NO 02(i)-72–08 OF 2022 (W) ('APPEAL NO 72') AND 02(i)-74–08 OF 2022 (W) ('APPEAL NO 74'): PREMA BONANZA SDN BHD V VIGNESH NAIDU A/L KUPPUSAMY NAIDU ('VIGNESH')

[20] This appeal involved the same project as Obata. On 18 July 2012, Prema who is the appellant in this appeal entered into a SPA with Vignesh, the respondent for the purchase of Parcel No A-37-G of the project with a purchase price of RM2,168,000 ('the property'). Upon completion of the project development, Prema gave a written notice to Vignesh on 25 January 2017 stating that the certificate of completion and compliance had been issued and vacant possession of the property was ready to be delivered. However, Vignesh claimed that the last date to deliver vacant possession was supposed to be on 17 July 2015 and Prema must be liable to pay Vignesh LAD for late delivery of vacant possession.

[21] Vignesh claimed that the SPA he had signed with Prema for the purchase of the property was not in the prescribed statutory form as mandated under the HDR. The SPA provides that the vacant possession of the property shall be delivered by the developer within 54 months and not 36 months from the date of the signing of SPA as prescribed under Schedule H of HDR.

Therefore, Vignesh claimed that any contradictions of the prescribed form are invalid and not binding, Vignesh sought the following reliefs from the court:

(a) a declaration that any notice given in accordance to an extension of time by virtue of reg 11(3) of the HDR for Prema to deliver vacant possession of the said property from 36 months to 54 months is invalid as in the Federal Court's decision in *Ang Ming Lee*;

(b) a declaration that Prema is bound to deliver vacant possession to Vignesh within a period of 36 months in accordance with statutory form from the date of the signing of the SPA;

(c) an order for Prema to pay LAD to Vignesh for late delivery of vacant possession:

(i) a sum of RM392,021.92; and

(ii) interest at the rate of 5%pa on the sum of RM392,021.92 from the date of filing of this claim to the date of full settlement.

[22] Two applications were filed in the High Court. The first application was by Vignesh for summary judgment order against Prema and the second application is by Prema to strike out Vignesh's claim.

[23] The main thrust of Vignesh's application for summary judgment is the absence of triable issues as the SPA executed is a statutory contract. Therefore, Prema as the developer cannot deviate or vary any of the terms of the prescribed form in Schedule H of HDR 1989 including extending the completion period in SPA from 36 months to 54 months. Any amendments and/or variations made to the SPA which is inconsistent and/or contradicts the terms in the prescribed Schedule H of HDR shall be of no legal effect and not binding. It therefore follows that Prema be required to deliver vacant possession within the completion period of 36 months in accordance with the prescribed form. Applying *Ang Ming Lee*, any EOT granted by the Controller of Housing to allow a completion period of 54 months is null and void. There are no triable issues and Prema shall be liable to pay LAD to Vignesh as stated in the statement of claim.

[24] In the striking out application, Prema contended that the suit filed by Vignesh is frivolous and vexatious as well as an abuse of the court's process. Vignesh's claim is obviously unsustainable and ought to be struck out pursuant to O 18 r 19(1)(b), (c) and/or (d) of the ROC 2012.

[25] The EOT obtained on 16 December 2010 was two years before the signing of the SPA. Vignesh failed to provide particulars as to why it has the right to claim LAD outside the scope of the SPA as the 36 months are nowhere to be found within the SPA signed by both parties. Therefore, Prema argued

that Vignesh claim for LAD based on a calculation of 36 months is frivolous, scandalous and amounts to an abuse of the court's process.

[26] Furthermore, Vignesh cannot rely on the case of *Ang Ming Lee* and totally disregard the extension of time approved without first determining that the extension of time is invalid by way of judicial review. The law is well settled that when a person is aggrieved by a decision of a public body concerning an infringed right protected under public law, any challenge to that decision shall be by way of a judicial review and must be made in accordance to the procedural requirement prescribed in O 53 of the ROC 2012.

[27] In any event, Prema has paid Vignesh the full LAD sum of RM13,067.40 for late delivery of vacant possession in accordance with the terms of the SPA. In addition, Vignesh has signed a letter dated 7 March 2017 undertaking to waive any further claims, demand and/or not to institute any legal suit or proceeding against Prema. These facts are not disputed.

[28] It was further contended by Prema that Vignesh's cause of action arises from the SPA entered into by both parties. Since the SPA dated 18 July 2012 stipulated that the completion period as 54 months, the limitation set in as early as 18 July 2018. Since the SPA was entered on 18 July 2012, this claim clearly falls outside the limitation period since it was eight years ago. The High Court concluded that Vignesh relied on statute of limitations but gave no reasons for the delay in filing the suit. Therefore, Vignesh's claim is barred by the limitation period as accorded in s 6(1)(a) of the Limitation Act 1953.

[29] Vignesh's claim against Prema is based on the Federal Court's decision of *Ang Ming Lee.* The High Court opined that the timeline under Form H of HDR is not rigid because the Regulations itself provides for an extension of time. Vignesh himself did not object or appeal to the Ministry as to the extension of time from 36 months to 54 months before signing the SPA. The EOT granted was already reflected in cll 25 and 27 of the SPAS since the EOT was approved and given two years prior to the signing of the SPA. Therefore, the extension of 54 months given to the defendant is valid and did not contravene the provisions of the HDR.

[30] Vignesh could not rely on the *Ang Ming Lee* case since there are substantive differences of background facts for both cases. Further, there was also no amendments made to the completion period after the parties have signed the SPA unlike in the case of *Ang Ming Lee.* In *Ang Ming Lee* the EOT was given after the signing of the SPA between the parties and there were amendments made to the terms in the prescribed form in Schedule H of HDR which changed the completion period in delivering vacant possession.

[31] Vignesh failed to provide particulars as to why he has the right to claim LAD outside the scope of the SPA as the 36 months are nowhere to be found within the SPA signed by both parties. Therefore, Vignesh's claim for LAD based on a calculation of 36 months has no legal basis or without merits.

[32] It is trite law that the parties to a contract are bound by the terms of the contract entered between them to perform their respective promises. There is no dispute between parties that the SPA has been concluded. The terms of the SPA are clear and unambiguous and the Plaintiff is bound by it. Vignesh is therefore estopped from denying what had been agreed between them.

[33] Moreover, Prema paid Vignesh the LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA. In addition, Vignesh signed a letter dated 7 March 2017 and further undertook to waive any further claims, demand and/or not to institute any legal suit or proceeding against the defendant.

[34] Prema successfully proved that Vignesh's case discloses no reasonable cause of action in the striking out application. Vignesh's claim was obviously unsustainable and ought to be struck out. The application for summary judgment by Vignesh was dismissed with costs of RM3,000.

THE COURT OF APPEAL

[35] Unhappy with the decision of the High Court Vignesh appealed to the Court of Appeal. The Court of Appeal allowed both appeals with costs. The orders of the High Court were set aside. The Court of Appeal further directed that the summary judgment application against the Prema be allowed, and the striking out application claim be dismissed.

[36] The reasons for the Court of Appeal's decision are summarised below:

(a) the application for the extension of time by the developer in *Ang Ming Lee,* unlike in the instant case, was made after the agreements had been signed by the purchasers in which the initial completion date of the agreements was contracted to be 36 months in accordance with Schedule H;

(b) the extension was granted after the sale and purchase agreements had been signed with the purchasers, like in *Ang Ming Lee,* or prior to, like in the instant case;

(c) as reg 11(3) of the HDR is ultra vires, the Controller has absolutely no power to give any extension or to amend the statutory contract, such that it is wholly inconsequential that the extension in this case was obtained before the execution of the SPA, whatever the background;

(d) the court is bound by the doctrine of stare decisis to follow *Ang Ming Lee*. The extension of time by 18 months granted by the Housing Controller pursuant to reg 11(3) of the Regulations in the instant appeals is not valid since regulation the aforesaid Regulation have been declared as ultra vires. It therefore must necessarily follow that the amendment made to the statutory contract to cll 25 and 27 of Schedule H — from 36 months to 54 months — on the basis of the extension allowed by the Housing Controller under reg 11(3) in this case is also void and of no effect;

(e) the extension granted by the Housing Controller under reg 11(3) of the HDR cannot be legitimised through estoppel, waiver or agreement between parties;

(f) the doctrine of estoppel does not therefore apply against a statute or statutory agreement such as in the instant case which revolves around the clauses in a statutory contract as prescribed in Schedule H to the Regulations;

(g) the principle of waiver or estoppel is in other words not applicable when reg 11(3) of the Regulations is ultra vires the HDA;

(h) Vignesh's right to claim LAD only arose on the date he accepted delivery of vacant possession of his property unit. Vignesh is deemed to have taken delivery of vacant possession of his property in early February 2017. Accordingly, Vignesh's cause of action to claim LAD accrued on that date;

(i) the six years limitation period under s 6(1)(a) of the Limitation Act 1953 would only expire in early February 2023. Since the instant suit was filed on 21 August 2020, which clearly is well within the limitation period, Vignesh's claims are not barred by limitation; and

(j) where the contractual breach concerns a claim for LAD as pleaded in this case, it is correct to hold that the cause of action accrues on the date of the SPA, despite the contention that the breach occurred when cll 25 and 27 were made to depart from Schedule H to the Regulations. Liquidated damages could not be claimed by the appellant at that early stage as it could certainly not as yet be ascertained before delivery of vacant possession. If limitation starts to run from the date of the SPA, but that a LAD claim could only be made much later on the expiry of the 36 months, the first three years of the limitation period would for all intents and purposes be wholly illusory.

[37] It was held by the Court of Appeal that the limitation period commenced from the expiry of the 36 months. Therefore, on the facts of this case Vignesh's suit is well within time and not time-barred under s 6 of the Limitation Act 1953 as contended. However, the Court of Appeal opined that the action must be instituted by way of judicial review as mandated under O 53

of the Rules of Court 2012. This is because although Vignesh is questioning the validity of the extension which is an administrative decision granted by the Controller. The Federal Court in *Ang Ming Lee* made it crystal clear that any extension allowed by the Housing Controller under reg 11(3) of the HDR is void. However, Vignesh's claim is based on the contractual breach of the SPA and not a challenge against an administrative decision.

[38] The Court of Appeal accepted the arguments advanced that the Federal Court in *Ang Ming Lee* did not pronounce expressly or by implication that its decision must have prospective effect on all the letters of extension of time which had been previously issued under the impugned provision of the Regulations to the developers. However, it is the Court of Appeal's view that based on cases such as *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another appeal* [2017] 3 MLJ 561, *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 and *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209; [2005] UKHL 41 and as correctly held by *Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors* [2021] MLJU 1923; [2022] 1 CLJ 120, the application of the doctrine of prospective overruling must be declared by the court which actually decided on the case which resulted in the clarification or the change in the law. In the absence of any further pronouncement by the Federal Court, the ruling by the Federal Court in *Ang Ming Lee* on reg 11(3) of the Regulations being void is to be applied retrospectively.

[39] For this appeal leave was granted on the following questions of law:

Q1: Does the doctrine of prospective overruling and the exceptions set out in *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209; [2005] UKHL 41 ('Spectrum Plus') apply to Malaysian cases where a court's decision and/or judicial pronouncement would bring disruptive consequences to an industry as a whole?

Q2: Does the reliance test (the greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling) apply to Malaysian cases where great reliance was placed on a statutory regime?

Q3: When does time for a purchaser's claim for liquidated ascertained damages start to run under s 6(1)(a) of the Limitation Act 1953 where:

(a) a purchaser and a developer enter into a sale and purchase agreement ('SPA') prescribed by Schedule H of HDR;

(b) the SPA expressly states a time frame of more than 36 months for delivery of vacant possession under cl 25 and completion of common facilities under cl 27 ('extended period');

(c) the purchaser claims that the extended period deviates from the 36 months prescribed by Schedule H of the HDR; and

(d) the purchaser consequently claims LAD from the developer for that part of the Extended Period which exceeds 36 months.

Q4: Whether a purchaser is to be taken to have enjoyed benefit at the expense of a developer when the developer is required to pay additional liquidated ascertained damages to the purchaser pursuant to the statutory agreement prescribed under Schedule H of the HDR having duly adhered to the extended time period for delivery of vacant possession and completion of common facilities as agreed by the purchaser and the developer?

APPEAL NO 01(f)-1–01 OF 2023(B): SRI DAMANSARA SDN BHD (SRI DAMANSARA) V (1) TRIBUNAL TUNTUTAN PEMBELI RUMAH; (2) FONG SOO KEN; AND (3) YOA KIAN HOW

[40] The Sri Damansara's appeal has common issues with Obata's and Vignesh's appeals but with a slight twist of facts. The appellant, Sri Damansara, is the developer of a condominium known as 'Foresta Damansara'. On 6 January 2012 the second respondent (Fong) paid RM10,000 to Sri Damansara as part payment for the purchase of a unit in the said condominium costing RM735,980 (subsequently discounted with a rebate of RM63,598). Subsequently vide a letter dated 13 February 2012, Fong requested Sri Damansara to add Yoa, (the third respondent) as a co-purchaser of the said unit.

[41] On 28 June 2012, Sri Damansara entered into SPA with both Fong and Yoa. It was agreed between the parties in the SPA, amongst others, that:

(a) Sri Damansara shall deliver vacant possession of the said Unit to Fong and Yoa within *42 calendar months* from the date of the SPA, as seen in cl 25(1) of the SPA; and

(b) by the terms of the SPA Sri Damansara shall complete the condominium's common facilities within *42 calendar months* from the date of the SPA, as provided in cl 27(1) of the SPA.

[42] Sri Damansara gave a discount of RM63,598 to Fong and Yoa through a credit note dated 17 July 2012 (rebate). Vide letter dated 22 December 2015 (about *41 months 25 days* from the date of SPA), Sri Damansara gave Fong and Yoa a notice to take delivery of vacant possession of the said Unit.

[43] Fong and Yoa filed a claim at the Homebuyers' Tribunal (the first respondent) for liquidated damages amounting to RM44,279.78 for the delay in delivering vacant possession of the unit and completing the common facilities. They computed their claim based on the purchase price before the rebate and the 42 months period to start running from the date of their part payment of the purchase price and not from the date of the SPA. Sri Damansara counterclaimed for the return of the rebate.

[44] The tribunal adopted the calculation by Fong and Yoa and ordered Sri Damansara to pay them RM41,134.22 as liquidated damages for late delivery of vacant possession of the unit only. Sri Damansara filed a judicial review application against the tribunal's decision and leave to review was granted.

[45] The High Court allowed parties to file further affidavits and supplemental written submissions on the effect of the inconsistency between the time stipulated in the SPA (42 months) for delivery of vacant possession with the Schedule H prescribed time (36 months). Sri Damansara affirmed an affidavit stating that they had filed an extension of time application at the end of 2011 with the Ministry of Housing and Local Government. Vide letter dated 17 January 2012, the Controller of Housing had, pursuant to reg 11(3) of the HDR allowed an extension to 42 months instead of the 48 months sought by Sri Damansara. The Controller's extension was granted prior to the execution of the SPA.

THE HIGH COURT

[46] The High Court judge allowed Sri Damansara's judicial review application in part for the following reasons:

(a) the High Court was bound by the case of *Ang Ming Lee* due to the doctrine of stare decisis. Regulation 11(3) of the HDR is *ultra vires the* HAD and since reg 11(3) is invalid, the Controller's approval of the extension made pursuant to the said provision is also invalid;

(b) even if parties do not raise illegality, the court is duty bound to take cognisance of it as it is contrary to public policy for the court to allow an illegality to be perpetrated. Also, lawyers ought to draw the court's attention to any illegality at the earliest opportunity, as they are officers of the court;

(c) the High Court was concerned that the court was not apprised of the reasons given by Sri Damansara to the Ministry of Housing in requesting for the extension of time, and the controller did not give any reasons for allowing the extension of time. The lack of reasons given by the Housing Controller is contrary to good governance and the decision of the Housing Controller may be arbitrary and unjust;

(d) reg 11(1) of the HDR provides that the SPA shall be in the form prescribed in Schedule H. From the use of the mandatory word 'shall', consequently the 36 months period provided in Schedule H binds the parties. The High Court judge accepted Sri Damansara's submission that the 36 months period runs from the date of the SPA, not from the date of part payment or any other case, due to the literal interpretation of cll 25(1) and 27(1) SPA as prescribed under Schedule H which stipulates 'from the date of this Agreement'. Further, Yoa did not contribute to the part payment and only Fong paid Sri Damansara. Therefore, Fong and Yoa cannot rely on the part payment as there was no contract formed with Sri Damansara when Fong paid. The tribunal therefore committed an error of law in deciding that the 42 months period commenced from the date of part payment;

(e) the tribunal ought to have considered the rebate because it amounted to a valid bilateral variation of the purchase price. By not taking the rebate into account, the tribunal unjustly enriched Fong and Yoa to Sri Damansara's detriment;

(f) the second irrationality of the tribunal was failing to consider Sri Damansara's counterclaim;

(g) the tribunal awarded liquidated damages for Sri Damansara's delay in delivering vacant possession of the condominium unit but completely omitted to give any award for the delay in completing the common facilities;

(h) based on the illegality and the three irrationalities above, the High Court quashed tribunal's decision;

(i) with the advent of O 1A, O 2 r 1(2) and O 53 r 2(3) of the ROC, the court in judicial review applications has wide powers to make any order in the interest of justice. Cases decided before the above rules came into force should be read with caution;

(j) even before the above rules came into force, the majority judgment in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 held that in a judicial review application, when the court quashes the decision of the Industrial Court by way of a certiorari order, the court has the power under para 1 and O 92 r 4 of the RHC (which is in *pari materia* with the present O 92 r 4 of the ROC) to grant monetary compensation in the interest of justice;

(k) if the court were to grant a mandamus for a second hearing, it would be an injustice to Fong and Yoa. For this reason, the High Court did not order a mandamus but ordered Sri Damansara to pay liquidated damages; and

(l) parties were invited to calculate the amount of liquidated damages on the basis that the 36 months period commences on the date of the SPA and the rebate is considered. The amount arrived at was RM39,327.10 so the HC awarded this sum to Fong and Yoa with interest and costs.

THE COURT OF APPEAL

[47] Aggrieved by the decision of the High Court, Sri Damansara appealed against the part of the High Court decision that ordered it to pay Fong and Yoa the sum of RM39,327.10 with interest until full settlement. It was contended by Sri Damansara among others, that the High Court judge erred in raising the issue of the time frame for delivery of vacant possession which was not even raised by parties at the tribunal or the High Court.

[48] Fong and Yoa filed a cross-appeal against the part of the High Court's decision that calculated liquidated damages from the date of the SPA. They contended that the time ought to be calculated from the date of the deposit or booking fee which formed part of the purchase price, pursuant to the cases of Faber Union and Hoo See Sen.

[49] The Court of Appeal unanimously dismissed the appeal on the following grounds:

(a) the core issue is whether the learned High Court may decide on the issue of the legality of the extension of time granted by the Housing Controller for the delivery of vacant possession of the said Unit even though the parties did not canvas this issue either in the proceeding before the tribunal and the learned High Court judge;

(b) the Court of Appeal opined that the learned judge was entitled to take cognisance of the issue of illegality. This is because even though the parties did not allude to the issue of illegality, the court is duty-bound to take cognisance of illegality, as the court should not knowingly be a party to the enforcement of an unlawful agreement (*Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 CLJ Rep 1, Privy Council and *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212, Federal Court);

(c) furthermore, in Schedule H, cll 25 and 29 provide that the delivery of vacant possession and completion of common facilities shall be completed within 36 months from the date of the agreement. In awarding the sum of RM39,327.10 to be paid by Sri Damansara, the learned High Court judge had considered and less the Rebate (which was not considered by the tribunal in its award), and the 36 months period was to commence from the date of the SPA. The learned judge had

correctly exercised his discretion under ss 25(1), 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964 and O 1A, O 2 r 1(2) and O 53 r 2(3) of the ROC 2012 to order Sri Damansara to pay liquidated damages for the late delivery of vacant possession of the Unit and the late completion of the common facilities. Hence, the Court of Appeal was of the view that the learned High Court decision was just and reasonable.

[50] Hashim Hamzah, judge of the Court of Appeal, delivering the judgment of the Court of Appeal said:

[23] However, in light of the recent Federal Court case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162, reg 11(3) of the 1989 Regulations was held to be ultra vires of the Act. As a result, the Housing Controller has no power to waive or modify any provisions in the Schedule H agreement. *Ang Ming Lee* is the latest Federal Court decision on this issue and is still a good law.

[24] In the present case, the learned HCJ had taken cognisance of the issue of illegality based on the above, even though the parties did not allude to any illegality before him. We believe the learned HCJ was entitled to do so.

[25] This is because even though the parties did not allude to the issue of illegality, the court is duty-bound to take cognisance of illegality, as the court should not knowingly be a party to the enforcement of an unlawful agreement.

[26] We agree with the learned HCJ who relied on the decision by the Privy Council in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 CLJ Rep 1 in which it was held that:

> it is well established as a general principle that the illegality of an agreement sued upon is a matter of which the Court is obliged, once it is appraised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded (see eg, *Edler v Auerbach* [1950] 1 KB 359) for clearly, no Court could knowingly be party to the enforcement of an unlawful agreement.

[27] In a similar tone, the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 through Jeffrey Tan FCJ (as he then was) comprehensively concluded that:

> Clearly, therefore, courts are bound at all stages to take notice of illegality, whether ex facie or which later appears, even though not pleaded, and to refuse to enforce the contract.

[28] As a result, the learned HCJ decided that the 36 months period as stipulated in Schedule H for the delivery of vacant possession and the completion of the common facilities shall apply to the SPA as statutorily and mandatory required by reg 11(1) of the 1989 Regulations. We see no reason to disturb the findings of the learned HCJ above.

[29] Parties have each obtained their respective benefits from the SPA, and the only matter for consideration would be the computation and award of liquidated

damages to the second and third respondents.

[30] The learned HCJ had exercised his discretion to order the appellant to pay liquidated damages to the second and third respondents for the late delivery of vacant possession of the Unit and the late completion of the common facilities, even though the learned HCJ had issued a certiorari to quash the first respondent's award due to illegality and irrationality. This discretion was exercised under s 25(1), 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964 (Revised — 1972) (Act 91) and O 1A, O 2 r 1(2) and O 53 r 2(3) of the ROC 2012.

[31] We have perused the appeal records and the grounds of the learned HCJ's decision. In awarding the sum of RM39,327.10 to be paid by the appellant to the second and third respondents, the learned HCJ had considered and less the Rebate (which was not considered by the first respondent in its award), and the 36 months period was to commence from the date of the SPA. We believe that the learned HCJ's decision above is just and reasonable.

[51] For the Sri Damansara's appeal, the Federal Court granted leave for one question of law. The question of law to be determined by this court is as follows:

> Whether the Second Actor Theory as endorsed by the United Kingdom Supreme Court in the case of *R (Majera) v Secretary of State for the House Department* [2022] AC 461 has any application where an innocent third party had relied on an earlier decision made by the public authority which was subsequently declared ultra vires.

FURTHER EVIDENCE APPLICATIONS

[52] After hearing from all the parties concerned we were of the unanimous view that the applications to adduce further evidence are devoid of merit and we dismissed with costs.

ANALYSIS AND DETERMINATION

[53] This judgment will address and discuss the issues in the order that we have requested the parties to submit before us.

Legislative framework

[54] In the 1970s and 1980s, in line with the country's drive for urbanisation, there was a rapid expansion of housing developments throughout Malaysia. With the upsurge in demand for housing in the nation, there was also an urgent need to protect house buyers from unscrupulous housing developers. There were cases where innocent purchasers invested their life long savings but ended up without the dream houses that they purchased because of abandoned projects or irresponsible developers absconding without completing the construction of the houses. Realising the need to control and

regulate the housing developers, the Housing Developers (Control and Licensing) Act 1966 (Act 118), renamed the Housing Development (Control and Licensing) Act 1966 (Revised 1973) ('the HDA') was legislated governing the housing industry with three objectives; to check abuses of the then infant housing industry, regulate the activities of housing developers and to protect house buyers by licensing and controlling housing developers. Prior to the introduction of the HDA in 1966, the housing development industry was unregulated. The long title expressly states that the HDA is an 'Act to provide for the control and licensing of the business of housing development in Peninsular Malaysia, the protection of the interest of purchasers and for matters connected therewith'.

[55] When the HDA Bill was tabled in 1966 the Minister of Local Government and Housing, the honorable Khaw Kai-Boh explained the reasons the government introduced the law:

> Mr Speaker, Sir, as you are well aware, there have been repeated instances, where innocent members of the public have fallen victims of rapacious and unscrupulous persons, who pose as housing developer and obtain substantial deposits as booking fees for houses, which they not only do not intend to build but also are in no position to do so. I also have personally received a continuous stream of letters from several persons concerned that they have paid deposits for houses in housing scheme and found to their dismay that no houses were being built and that they could not recover their deposits. A good parallel to this are the mushroom insurance companies which, only a few years ago prior to the introduction of the Insurance Act, 1963, swindled ignorant people of millions of dollars.
>
> ... that legislative measures should be taken to protect the people from bogus and or unscrupulous housing developers. Hence this Bill.

[56] The Minister explained in his speech in Parliament introducing the Bill described the Bill as a straightforward one, and will among other things, empower the Minister to issue direction to a licensed housing developer for the purpose of safe-guarding the interest of purchaser, make such other general directions as are considered, appropriate and to carry out investigations into the affairs of the housing developers. Power is also given to the Minister to make rules for the purpose of administering the Bill. The Bill provides certain conditions which must be fulfilled before a housing developer is issued with a license to carry on any housing development. Provision is made for the Controller of Housing to revoke a license issued to a housing developer where the housing developer does not meet his obligations. Provision is also made for a licensed developer to be heard before his license is revoked, and the housing developer has the right to appeal to the Minister against any decision of the Controller.

[57] Since its introduction the HDA underwent many changes to

A strengthen the Act to ensure that not only the potential purchasers and purchasers' interests are protected but the Housing Developer's interest as well.

B **[58]** Section 4 of the HDA provides for the appointment of a Controller, Deputy Controllers, Inspectors and other officers and servants by the Minister as he may deem fit from amongst members of the public service. The Controller and Deputy Controllers shall have and may exercise any of the powers conferred on an Inspector by or under the HDA.

C **[59]** With the introduction of the HDA, the Housing Developers (Control and Licensing) Regulations 1989 ('the HDR') was legislated pursuant to s 24 of the HDA. Section 24 of the HDA empowers the Minister to make regulations for the purpose of carrying into effect the provisions of this Act. In particular relating to the following matters:

D (a) regulate the advertisements of a licensed housing developer;

(b) regulate the use of names of housing estates developed by a licensed housing developer;

(c) prescribe the form of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise;

E

(d) regulate payments (under whatever name these may be described) which may be made by a purchaser either before, during or after the construction or completion of the house, flat or other accommodation for which that purchaser is required to make the payments, including the amount of the payments, the time when the payments become due and conditions that shall be fulfilled by a licensed housing developer before he may ask for the payments;

F

(e) regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser;

G

(f) prescribe the fees which are payable under this Act;

(g) prescribe that any act or omission in contravention of any of the regulations shall be an offence and provide for the penalties therefor either by way of fine or imprisonment or both: provided that any fine so provided shall not exceed fifty thousand ringgit and a term of imprisonment so provided shall not exceed five years, and in addition thereto may also provide for the cancellation and suspension of a licence issued under this Act;

H

(h) prescribe the moneys which shall be paid into or withdrawn from the Housing Development Account and the conditions for such withdrawals;

I

(i) prescribe offences which may be compounded and the forms to be used in and the method and the procedure for compounding such offences;

(ia) provide for an exemption from the operation of this Act of such housing

developer or housing accommodation as the Minister deems expedient and prescribe the form, limitations, restrictions or conditions of such exemption; and

(j) provide for any matter which under this Act is required or permitted to be prescribed or which is necessary or expedient to be prescribed to give effect to this Act.

[60] Regulation 11 of the HDR is the provision of interest in the disputes and reads as follows:

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the sub divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.

(1A) Notwithstanding paragraph (1), every contract of sale for build then sell for a housing accommodation together with the sub divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule I and where the contract of sale for build then sell is for the sale and purchase of a housing accommodation in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule J;

(1B) Sub regulations (1) and (1A) shall not apply if at the time of the execution of the contract of sale, the certificate of completion and compliance for the housing accommodation has been issued and a certified true copy of which has been forwarded to the purchaser.

(2) No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale.

(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.

(4) A purchaser's solicitor shall be entitled to a complete set of the contract of sale including its original and duplicate copies and all annexures required for the licensed housing developer to execute the contract of sale with the purchaser, free of charge subject to the undertaking of the purchaser's solicitor to return the said documents intact in the event the contract of sale is not executed by the purchaser within fourteen (14) days from the date of receipt of such documents unless otherwise agreed by the licensed housing developer.

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281 (FC)

[61] The facts in *Ang Ming Lee* are different and distinguishable from the facts of all the appeals before us. In *Ang Ming Lee*, the developer of Sri Istana Condominium, BHL Construction Sdn Bhd and the purchasers of the condominium units entered into SPAs pursuant to the prescribed form under Schedule H of the HDR. Under the pultra viresrescribed SPA the delivery of vacant possession of the units was 36 months from the date of signing of the SPAs. Sub-paragraph 25(2) of Schedule H provided that in the event the developer fails to deliver vacant possession within 36 months the developer shall be liable to pay the purchasers liquidated ascertained damages ('LAD'). In so far as the completion date the SPA executed by the parties stipulated that it is 36 months as prescribed.

[62] In the midst of the construction of the project, the developer applied to the Controller for an extension of time for the delivery of vacant possession of the units to the purchasers, pursuant to reg 11(3) of the HDR, but the application was rejected by the Controller. The developer then appealed against the Controller's decision, to the Minister of Urban Wellbeing, Housing and Local Government, pursuant to reg 12 of the Regulations, The Minister allowed the appeal and granted an extension of 12 months giving the developer 48 months to deliver vacant possession of the units to the purchasers, instead of the statutorily prescribed period of 36 months. Due to the approved extended period to deliver vacant possession, the purchasers were unable to claim for LAD. Aggrieved by the Minister's decision, the purchasers filed an application for judicial review, at the High Court, against the Minister, the Controller and the developer, seeking: (i) an order of certiorari, quashing the decision of the Controller; and (ii) a declaration, either jointly or in the alternative, that the letter allowing the extension of time (the letter), signed by an officer of the Ministry, Jayaseelan on behalf of the Controller, was invalid and beyond the jurisdiction stipulated in the HDA; and reg 11(3) of the Regulations was ultra vires the Act. In support of their application, the purchasers submitted, inter alia: (i) the Controller's decision was nonappealable and the Minister had no power to hear the appeal; (ii) the Controller and/or the Minister had denied the purchasers' right to be heard, rendering the Minister's decision null and void; and (iii) the letter was signed on behalf of the Controller and not the Minister. The High Court allowed the application and granted the orders sought by the purchasers. Dissatisfied with the decision of the High Court, the developer appealed to the Court of Appeal.

[63] The Court of Appeal held as follows:

(a) reg 11(3), being a provision designed to regulate and control the terms of the SPAs, is not ultra vires the Act. The Controller has wide powers under

the Act and has the power to exercise his discretion, as granted under reg 11(3) of the Regulations, to waive or modify the terms and conditions of the contract of sale;

(b) the order contained in the letter was made without jurisdiction, ultra vires the Act and was a nullity and of no effect; and

(c) since the purchasers were not given the opportunity to be heard, the decision on the extension of time was set aside as it was null and void.

[64] The questions for determination by the Federal Court in *Ang Ming Lee* were as follows:

(a) whether the Controller had the power to waive or modify any provision in the Schedule H contract of sale, as prescribed by the Minister, under the Act;

(b) whether s 24 of the Act confers on the Minister, the power to make regulations for the purpose of delegating the power to waive or modify Schedule H contract of sale, to the Controller;

(c) whether reg 11(3) of the Regulations was ultra vires the Act;

(d) whether the letter must be signed personally and whether the Minister could delegate, his duty of signing the letter granting the extension of time, to an officer in the Ministry; and

(e) whether the Minister, having taken into consideration the interests of the purchasers, was obliged to afford the purchasers with a hearing prior to the Minister's decision, *albeit* there is no such provision or requirement in the Act.

[65] It was held by the Federal Court that the Controller has no power to waive or modify any provision in the Schedule H Contract of Sale because s 24 of the Act does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H Contract of Sale to the Controller and the Minister does not possess the implied power to do so. Consequently the Federal Court declared that reg 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is the Act.

The limitation challenge

[66] In respect of Obata's appeal the facts are straightforward and maybe summarised as follows. Obata, bought two parcels of residential units and executed the SPAs on 11 July 2012 and 18 July 2012. The period of completion of the two units was extended from 36 months to 54 months pursuant to reg 11 of the HDR. Obata alleged that the letter approving the extension from 36

A months to 54 months was never given to them neither did they have any knowledge of the approval. Obata further contended that it was only after the suit was filed in the High Court post *Ang Ming Lee* that a copy of the approval was given. Vacant possession of the units was duly delivered by Prema on 25 January 2017 and as such Obata claimed that applying *Ang Ming Lee* there B was a delay of 550 days as it exceeded the completion period of 36 months as statutorily provided in Schedule H of the HDR.

[67] Obata commenced the suit in the High Court and applied for summary judgment against Prema. This was followed by an O 14A application C by Prema. As we have stated above the High Court dismissed the summary judgment application but allowed the O 14A application and ordered that Obata's suit be struck out.

D **[68]** The questions posed for the High Court's determination under the O 14A application are as follows:

(1) does the cause of action claimed by the plaintiffs accrue from the date of the SPA?

E (2) has limitation period set in in that regard?

(3) if the answers to questions 1 and 2 are in the negative,

(a) when does the cause of action claimed by the plaintiffs accrue? and

(b) whether it is at the point where booking fee is paid, date of the SPA F or the date of vacant possession delivered?

[69] The High Court distinguished *Ang Ming Lee* and the case before him and concluded that Obata's cause of action is statute-barred:

G [51] The defendant in this present case should be entitled to find comfort in the fact that it is no longer at risk from a stale claim given that the SPAs have been entered into more than six years ago. It should be able to part with its records and be unencumbered from any burden in obtaining proof of witnesses related to the granting of EOT back in year 2010.

H [52] The underlying rationales behind the need to prescribe statutory limitation periods for the causes of action of the temporal beings include:

(a) lapse of long time renders the claims stale;

(b) lapse of long time results in loss of evidence or in fading memories of witnesses or in the demise or disappearance of witnesses; I

(c) lapse of long time results in intervening rights of innocent third persons or *bona fide* purchasers for value subsequent thereto;

(d) lapse of long time causes material disruptions in the lives, relationship, etc of affected persons.

(See: *Sunitha Madhu v Palayam Nagappan & Ors* [2021] MLJU 301; [2021] CLJU 296; [2021] 1 LNS 296).

[53] I am aware of the decision of *Ang Ming Lee* raised by the plaintiffs' counsel and the said decision in respect of HDA being a social legislation designed to protect the house buyers against the developer. Nevertheless, in so far as the claim of LAD is concerned, I am of the view that the protective hands of this court should not reach beyond the fence of limitation period which is statutorily prescribed, otherwise it will give rise to gravely unfair and disruptive consequences for past transactions. Balance must be struck between the right of the purchasers in enforcing their rights to LAD and the law of limitation which requires strict observation.

[54] I find favour in the defendant's counsel's argument that none of the following time reference points, assuming taking the latest date, would have met the statutory time limit given the delay:

(a) Date of the SPAs;

(b) 25 January 2017, being the date of vacant possession;

(c) 26 November 2019, being the date of when the decision in *Ang Ming Lee* is delivered by the Federal Court.

[70] The High Court judge articulated in his grounds of judgment:

[58] Given the background of the present suits which was after the decision of the Federal Court in *Ang Ming Lee* without going through the process of judicial review, I have no doubt that the defendant herein is totally caught off guard. I am also of the view that the defendant is clearly at a disadvantage of having to defend the decision of the Minister and/or Controller which was given in 2010, against the decision in *Ang Ming Lee* which was decided *circa* ten years later in 2020. Bearing in mind that the law back in 2013 was as held in *Sentul Raya Sdn Bhd* which allowed the developer to apply for a deviation of the terms of the prescribed SPA in Schedule H of the HDR, I share the same view as Asmabi J that to allow the decision in *Ang Ming Lee* to apply to the facts of this case would be absurd and against public policy. It is my respectful view that to do so will not only open unnecessary floodgates against all developers in this country leading to a crippling effect on the housing industry, it will also lead to judicial chaos with thousands of cases being filed in court claiming additional LAD pursuant to and based on *Ang Ming Lee*.

[59] In addition to my above reasoning, I am also not in favour of the plaintiffs' submission that their cause of action starts running from the time vacant possession is handed over to the purchaser/s as I am of the view that they are estopped from claiming further LAD.

[71] Obata appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the decision of the High Court. The Court of Appeal affirmed the decision of the High Court that Obata's claim is barred by limitation, as the six-year period had expired on 10 July 2018 and 17 July 2018, respectively:

[28] The plaintiff further claimed that by the said amendment, the defendant had breached the Housing Development (Control and Licensing) Act 1966 and Sch H of the HDR 1989. Therefore, the said amendment (that is, amending the delivery period from 36 to 54 months), which is in breach of Sch H of the HDR 1989, is invalid and is not binding on the plaintiff. As such, the defendant is still bound to deliver vacant possession within 36 months, not 54 months as stipulated in the SPAs that was executed by the parties.

[29] Therefore, in gist, on its pleaded case, the plaintiff's cause of action is that:

(a) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and

(b) that the defendant has breached Schedule H of the HDR 1989, by amending the time for delivery of vacant possession from 36 months to 54 months.

[30] Based on the above-mentioned pleadings, the plaintiff therefore applied for a declaration that the EOT granted by the Ministry in 2010 is invalid premised on the decision of the Federal Court in *Ang Ming Lee* and a declaration that the defendant is bound by sch. H of the HDR 1989 to deliver vacant possession within 36 months from the date of execution of the SPAs.

[31] It is not in dispute that when the plaintiff executed the SPAs, both cll 25 and 27 specified that vacant possession shall be delivered within 54 months from the date of the signing of the SPAs. It is also not in dispute that the plaintiff did not make any allegation of fraud against the defendant.

[32] Therefore, what the plaintiff is now claiming is that the defendant had purportedly amended both cll 25 and 27 of the SPAs, from 36 months to 54 months based on the EOT granted by the Ministry on/around 16 December 2010. This amendment was made to all the SPAs, for the purpose of selling all the parcels of The Sentral Residences, and this amendment was made before the plaintiff executed the SPAs. This amendment, which was made to the SPAs, according to the plaintiff, is in breach of sch. H of the HDR 1989, and is therefore invalid. This can also be seen from the written submissions of the plaintiff, inter alia:

> 2.8 The Developer amended the completion period from 36 months to 54 months in the prescribed statutory form in Schedule H. At the time of execution of the SPA, the Developer did not inform the Purchaser that there was an EOT purportedly granted by the Controller of Housing ('the Controller') to extend the completion period.
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> ...
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> 2.12 In short, the Purchaser's case is that the Developer did not pay the full LAD amount calculated based on 36 months completion period as required by Schedule H of HDR 1989 which the Purchaser is entitled in law to receive the full statutory LAD. (Emphasis added.)

[33] In other words, the plaintiff is challenging the validity of both cll 25 and 27 of the SPAs, from the date of the signing/execution of the SPAs. This challenge is premised on a breach of sch. H of the HDR 1989, as interpreted by the Federal

Court in *Ang Ming Lee*. The plaintiff is, therefore, challenging the validity of the purported amendment to both cll 25 and 27 of the SPAs, from the inception or execution of the SPAs. The contractual breach that the plaintiff is complaining about is the purported amendment to both cll 25 and 27 of the SPAs (see *Nasri v Mesah)*. Since the plaintiff is challenging both cll 25 and 27 of the SPAs from the inception or execution of the SPAs, then the plaintiffs cause of action runs from the date of the execution of the SPAs, that is, on 11 July 2012 and 18 July 2012 respectively.

[34] Therefore, we agree with the learned judge that the plaintiffs claim is barred by limitation, as the six-year period had expired on 10 July 2018 and 17 July 2018, respectively. Since this suit was filed on 18 June 2020, limitation has already set in.

[72] In respect of Vignesh's appeal the SPA was executed on 18 July 2012 stipulating expressly in the SPA that the completion period for the project was 54 months. The vacant possession notice that the unit was ready to be delivered was issued to Vignesh on 25 January 2017. Despite that vacant possession was delivered and having accepted and received the LAD for the delay Vignesh filed the suit in August 2020 after the *Ang Ming Lee* decision.

[73] Before the High Court there were two applications. One application is by Vignesh for summary judgment against Prema and the second application is by Prema for a striking out order.

[74] As we have earlier alluded prior to filing the suits in court, both Obata and Vignesh entered into a settlement agreement with Prema in 2017. Obata had accepted the payment sum of RM10,017.53 and RM16,891.51 respectively as full and final settlement of the LAD claims by a settlement letters dated 14 March 2017. in Vignesh there was a delay in the delivery of vacant possession. However, by a settlement letter dated 7 March 2017 Vignesh had accepted the payment of a sum of RM13,067.40 as full and final settlement of all LAD claim under the SPA.

[75] Like Obata, Vignesh filed an application for summary judgment on 11 September 2020 and Prema filed to strike out the claim. The High Court allowed the striking out application by Prema. The Court of Appeal reversed the High Court's decision and allowed Vignesh's appeal.

[76] Similar arguments were also raised in the Vignesh's appeal. Learned counsel for Vignesh, Dato Low Joo Hean submitted that at the time the SPA was signed there was no delay by the Developer to deliver vacant possession. Thus, if there is no delay in the delivery of vacant possession then there is no cause of action to claim ultra viresthe LAD against Prema, the developer. There is no cause of action at the time the SPA was executed. Based on 36 months completion period for vacant possession to be delivered, the cause of action

would have accrued on 8 July 2017. The LAD can only be computed on the date Vignesh as the purchaser, is deemed to have taken vacant possession when the LAD amount is crystallised. Learned counsel for Vignesh contended that the six years limitation period only expired on February 2023. Vignesh filed the suit on 21 August 2020, within the time limit and his claim is clearly not time barred. The learned High Court judge, however found Vignesh's claim obviously unsustainable and struck out pursuant to O 18 r 19(1) of the ROC 2012. Her Ladyship, Rozana Ali Yusoff, gave her reasons as follows:

> [26] At this juncture, I am of the view that the plaintiff could not rely on the *Ang Ming Lee* case since there are substantive differences of background facts for both cases. Further, there was also no amendments made to the completion period after the parties have signed the SPA unlike in *Ang Ming Lee.* Contrary to *Ang Ming Lee,* where the EOT was given after the signing of the SPA between the parties and there were amendments made to the terms in the prescribed form in Schedule H of HDR 1989 which changed the completion period in delivering vacant possession from 36 months to 48 months.
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> [27] In addition, the Plaintiff also has failed to provide particulars as to why he has the right to claim LAD outside the scope of the SPA as th 36 months are nowhere to be found within the SPA signed by both parties. Therefore, the Plaintiff's claim for LAD based on a calculation of 36 months has no legal basis or without merits.
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> [28] It is trite law that the parties to a contract are bound by the terms of the contract entered between them to perform their respective promises. It is also clearly provided under s 38 of the Contracts Act 1950 that a party to a contract must, unless excused under the Contracts Act or any other law, be bound by the terms of the contract so entered between them. There is no dispute between parties that the SPA has been concluded. The terms of the SPA are clear and unambiguous and the plaintiff is bound by it. Plaintiff is therefore estopped from denying what had been agreed between them (see Court of Appeal in *Anuar bin Abu Bakar v Samsuri bin Booyman* [2016] 6 MLJ 96; [2016] 8 CLJ 317).
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> [29] Moreover, the defendant has fully paid to the plaintiff the LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA. The plaintiff has signed a letter dated 7 March 2017 and further undertaken to waive any further claims, demand and/or not to institute any legal suit or proceeding against the defendant.

[77] On appeal the Court of Appeal allowed Vignesh's appeal. Mohd Nazlan Ghazali JCA delivering the judgment of the court said:

> [21] … For clearly, it matters not that the extension was granted after the sale and purchase agreements had been signed with the purchasers, like in *Ang Ming Lee,* or prior to, like in the instant case. As reg 11(3) is ultra vires, the housing controller has simply and absolutely no power to give any extension or to amend the statutory contract, such that it is wholly inconsequential that the extension in this case was obtained before the execution of the SPA, whatever the background.
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> [22] This court is in this respect bound by the doctrine of stare decisis to follow *Ang*

Ming Lee. The extension of time by 18 months granted by the housing controller pursuant to reg 11(3) of the Regulations in the instant appeals is not valid since reg 11(3) itself is ruled to *be ultra vires*. It therefore must necessarily follow that the amendment made to the statutory contract to cll 25 and 27 of Schedule H — from 36 months to 54 months — on the basis of the extension allowed by the housing controller under reg 11(3) in this case is also void and of no effect.

[23] As such, the learned High Court judge's finding that the prescribed period of 36 months is not a rigid number because the Regulations provide for an extension of time under reg 11(3) is plainly erroneous. For the same reason that reg 11(3), being the basis of the extension granted by the housing controller is and therefore void, the other findings of the learned High Court judge that appellant did not object or appeal to the Ministry on the extension, and that there were no amendments made to the completion period after the parties had signed the SPA, unlike in the case of Ang *Ming Lee*, and that parties are bound by the terms of the SPA executed between them are all irrelevant.

[24] This important point does not give rise to any triable issue.

[78] Learned counsel for Obata, Dato Low Joo Mean further argued that the High Court judge did not explain how he concluded that the breaches occurred on 11 July 2012 and 18 July 2012 and that the limitation periods for filing the claims expired on 11 July 2018 and 18 July 2018. Learned counsel canvassed the following arguments in support of the appeals.

[79] The claim for LAD is not premised on the declaratory reliefs as the right of Obata for the liquidated declaratory relief is not dependent on the success of Obata's claim. The appellant referred this court to the case of *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256; [1984] 1 MLRA 104 where this court held that

... there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of s 24 quoted above, although the appellant may well be guilty of an offence under r 17 for contravening r 11(1) of the Housing Developers (Control and Licensing) Rules 1970. In other words, these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers.

[80] In response to the submission of learned counsel for Obata and Vignesh, Mr Lai Chee Hoe, learned counsel for Prema submitted that the right of Obata and Vignesh under the prescribed Schedule H agreement is derived from the HDA and is statutorily protected notwithstanding that the actual agreement had been modified by providing a time frame for delivery vacant possession from 36 months to 54 months. Learned counsel relied on the case of *Prema Bonanza Sdn Bhd v How Hoe Lian @ Law Hoe Lian & Anor* where it was held by the Court of Appeal that in a case where Schedule H Agreement had

A been improperly extended to 54 months the limitation period would commence upon the expiry of the 36 months and not from the date of Schedule H Agreement.

B **[81]** The SPAs were executed on 11 July 2012 and 18 July 2012 respectively. The actions were commenced on 18 June 2020 and 21 August 2020. It is Prema's argument in the appeals before us that Obata's and Vignesh's claims clearly fall outside limitation period since the SPA was executed eight years before the suits were filed. The purchasers' claim is therefore barred by limitation.

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[82] The facts in *Ang Ming Lee* are entirely different and can be distinguished. It is necessary to reiterate the facts and the principles expounded in *Ang Ming Lee.* In *Ang Ming Lee,* the purchasers brought judicial review
D applications against the Minister, the Controller and the developer. The purchasers sought an order to quash the decision of the Controller who had granted the extension of the time period for delivery of vacant possession from 36 months to 48 months in respect of the SPA entered into between the purchasers and the developer. The purchasers also sought a declaration that the
E letter of 17 November 2015 was invalid as being beyond the jurisdiction stipulated in the Act and thus ultra vires the Act.

[83] In *Ang Ming Lee* there were delays in completing the housing project resulting in a delay of vacant possession to purchasers. The developer without
F notifying the purchasers filed an application for an extension of time for delivery of vacant possession of the units to the Controller of Housing vide letter dated 20 October 2014 pursuant to reg 11 of the HDR. The said application for extension of time was not approved by the Controller. The developer then lodged an appeal to the Minister pursuant to reg 12 of the HDR
G giving reasons for the delay in completing the project within the stipulated period in the SPAs. The developer's appeal for extension of time for the delivery of vacant possession for the said units was subsequently approved by the Minister vide letter dated 17 November 2015 granting an extension of 12 months. It is Obata's and Vignesh's case that they have no knowledge of the
H extension of time granted by the Minister.

[84] In Obata and Vignesh the background facts are distinctly different from *Ang Ming Lee.* The extension was granted before the SPAs were executed. Both had executed the SPAs where it was expressly stipulated that the
I completion period and delivery period were 54 months. There was delay but both Obata and Vignesh were paid the LAD as provided under the SPAs.

[85] The issue of limitation was not before the Federal Court. Hence, the Federal Court in *Ang Ming Lee* did not address the issue of the SPA being time

barred pursuant to s 6(1) of the Limitation Act 1953 as the central issue before the court was whether reg 11(3) of the HDR is ultra vires the HDA.

[86] In respect of the appeals before us the issue to be determined is when the cause of action arose. Whether the cause of action arose after the decision of *Ang Ming Lee* or within six years after the execution of the SPAs?

[87] The specific clauses in the SPAs whereby approval was granted to vary in 2012 need to be examined. Clause 25(3) of the SPA reads as follows:

> For the avoidance of doubt, any cause of action to claim for liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser take vacant possession of the said Parcel. The Purchaser is deemed to have taken vacant possession upon expiry of fourteen (14) from the date of the VP Notice.

[88] Clause 26(3) of the SPA stipulates:

> Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

[89] It is trite that the cause of action for a contract accrues from the date of its breach and the time runs from that breach. Section 6(1)(a) of the Limitation Act 1953 (Act 254) provides as follows:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
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> (a) actions founded on a contract or on tort;
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> (b) actions to enforce a recognisance;
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> (c) actions to enforce an award;
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> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[90] Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 defined a cause of action' as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another'. This definition was adopted in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, where Abdul Hamid Ag LP, as he then was, stated 'there must be a cause of action before a plaintiff can claim a relief in an action:

> A cause of action is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB

A 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

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[91] In *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85, Gill FJ described a cause of action as 'the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per: Esher MR in *Read v Brown* (1888) 22 QBD 128)'. The Federal Court referred to *Reeves v Butcher* [1891] 2 QB 509 where Lindley LJ said:

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> This expression, cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

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[92] Gill FJ further articulately explained 'the date of accrual' in the case of a debt will be on the date the debt could be recovered:

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> In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 617. Viscount Dunedin described 'cause of action' as that which makes action possible. *Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach.* Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field X in *Gibbs v Guild* 8 QBD 296 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. (Emphasis added.)

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[93] Salleh Abbas, LP explained what is cause of action in *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12:

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> What then is the meaning of 'a cause of action'? 'A cause of action' is a statement of facts alleging that a plaintiffs right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly,

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such right has been affected or prejudicated by the appellant/defendant's act. A

[94] The Privy Council explained in *Bolo v Kokland & Ors* AIR 1930 PC 270 that:

> ... There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted. B

[95] *Nasri v Mesah* and all the cases that we have referred to above are still good law. The Federal Court cases of *Loh Wai Lian v Sea Housing Corporation Sdn Bhd* [1984] 2 MLJ 280, *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188, and *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209 have all followed *Nasri v Mesah.* Therefore, it is clear that a cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action. C D

[96] In the appeals before us, Obata and Vignesh are in effect challenging the validity of the clauses, which are, cll 25 and 27 of the SPA. Terms which they have agreed to when they signed the SPAs in 2012. In respect of limitation we are of the view that based on the law on limitation it is clear that time begins to run at the earliest point of time the claimants, Obata and Vignesh could commence action. The cause of action would have accrued from the date of the execution of the SPAs or if there was any breach of the terms of the SPAs. This court in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 at p 759; [2014] 1 CLJ 207 at p 221 held: E F

> ... A cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action. G

[97] An action founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. The rationale of the policy for the existence of limitation has been eloquently explained by Hashim Yeop Sani SCJ in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871: H

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense. I

[98] The causes of action in the appeals before us are based on contract and s 6(1) of the Limitation Act requires civil claim to be filed before the expiration

of six years from the date on which the cause of action accrued which would be the date the SPAs were executed. Both Obata and Vignesh executed the SPAs with the knowledge that the completion period of the housing project was 54 months. Prema had obtained the approval of the Minister of Housing and Local Government to vary the prescribed completion date by extending the completion period to 54 months prior to the execution of the SPA. When they signed the SPA at that material time they would have legal counsel and should have enquired or raised any doubts before or when executing the SPA.

[99] Obata and Vignesh had agreed when they signed the SPAs that the completion period shall be 54 months from the date of execution of the SPAs. A very intriguing and relevant fact which we cannot ignore or brush aside is that both Obata and Vignesh executed a full and final settlement when they accepted the payment of the LAD in 2017 from the developer. Obata and Vignesh could have and should have raised the issue of the validity of clauses in the SPAs before signing the full and final settlement in 2017 which they failed to do so.

[100] In the appeals before us both the actions were filed in 2020, that is, outside the period of limitation. And as we have explained based on the reasons above, a claim for LAD where the cause of action accrued beyond six years before *Ang Ming Lee*, the claim is time barred. The claims are barred by limitation, as the six year period had expired. Therefore, Obata's and Vignesh's claims must necessarily fail.

[101] The questions posed in Obata are answered as follows:

Q1: Whether a sale and purchase agreement for a housing accommodation of a high rise building between a purchaser and a developer which provides for a period for completion of the housing accommodation extended illegally under the ultra vires reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 should revert to the three year period as provided in the standard Schedule H Agreement?

A: Negative

Q2: Whether the cause of action for the late delivery liquidated damages shall accrue to the purchaser only upon expiry of the said three year period?

A: Negative

Q3: Whether the limitation period of a claim for the late delivery liquidated damages shall commence only upon the expiry of the said three year period?

A: Negative

[102] In respect of limitation the questions posed in Vignesh are answered as follows:

Q3. When does time for a purchaser's claim for liquidated ascertained damages start to run under s 6(1)(a) of the Limitation Act 1953 where:

(a) a purchaser and a developer enter into a sale and purchase agreement ('SPA') prescribed by Schedule H of HDR;

(b) the SPA expressly states a time frame of more than 36 months for delivery of vacant possession under cl 25 and completion of common facilities under cl 27 ('extended period');

(c) the purchaser claims that the extended period deviates from the 36 months prescribed by Schedule H of the HDR; and

(d) the purchaser consequently claims LAD from the developer for that part of the extended period which exceeds 36 months.

A: The cause of action accrued when there is a breach of the terms stipulated in the SPA. The SPA executed and accepted by the purchaser expressly stated that the delivery of vacant possession is 54 months. There is no breach of the terms of the SPA.

Q4. Whether a purchaser is to be taken to have enjoyed benefit at the expense of a developer when the developer is required to pay additional liquidated ascertained damages to the purchaser pursuant to the statutory agreement prescribed under Schedule H of the HDR having duly adhered to the extended time period for delivery of vacant possession and completion of common facilities as agreed by the purchaser and the developer?

A: Affirmative

The Second Actor Theory

[103] In the Sri Damansara's appeal, the question to be determined by this court is as follows:

> Whether the Second Actor Theory as endorsed by the United Kingdom Supreme Court in the case of *R (Majera) v Secretary of State for the House Department* [2022] AC 461 has any application where an innocent third party had relied on an earlier decision made by the public authority which was subsequently declared ultra vires.

[104] The determination of the question posed before us is important and critical, not only to this appeal but also to cases and/or disputes in respecultra virest of approval of extension of time by the Controller granted before the parties executed SPAs. It also extends to parties who had voluntarily agreed to the SPAs and accepted the extended time period for the delivery of vacant possession. The Federal Court in *Ang Ming Lee* ruled that reg 11(3) of the HDR, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is ultra vires the Act. The Federal Court did not hold that the Minister is not empowered to grant an extension of time. The Federal Court said that the Minister could not delegate the power to modify or vary the prescribed form of SPA to the Controller but instead must apply his own mind to the matter of an extension of time for the developer there to complete the units:

> [36] By s 24(2)(e) of the Act, the Minister is empowered or given the discretion by Parliament to regulate and prohibit the terms and conditions of the contract of sale. As opined by the learned authors in De Smith's Judicial Review, a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but the presumption may be rebutted, by any contrary indication found in the language, scope or object of the Act. In our view, having regard to the object and purpose of the Act, the words 'to regulate and to prohibit' in sub-s 24(2)(e) should be given a strict construction, in the sense that *the Minister is expected to apply his own mind to the matter and not to delegate that responsibility to the controller.* (Emphasis added.)

[105] In the Sri Damansara's appeal the purchasers executed the SPA sometime in June 2012. On 17 July 2012 Sri Damansara gave the second and third respondents a discount of RM63,598 by way of a credit note. Amendment was made to the date of delivery of vacant possession from the prescribed 36 months to 42 months. In December 2015 vacant possession was delivered. The purchasers filed a claim with the Housing Tribunal in 2017 for late delivery. In their claim the second and third respondents contended that the period of 42 months for the delivery of vacant possession must be computed from the date of part payment. The Tribunal allowed the claim for LAD based on the original price without considering the rebate given and computed on the basis that the 42 months took effect from the date of the part payment and ordered Sri Damansara to pay the sum of RM41,134.22. Sri Damansara filed judicial review on the grounds that the Tribunal had erred by partially allowing the purchasers 'claims. In 2019 the High Court allowed in part Sri Damansara's judicial review application and reduced the amount to RM39,327.10. In the High Court even though the issue of illegality was not raised by the parties the learned High Court judge on his own motion determined the issue. On appeal the Court of Appeal dismissed Sri Damansara's appeal.

[106] The application of the Second Actor Theory is the only argument advanced by learned counsel for Sri Damansara. Learned counsel for Sri Damansara, Dato' Lim Chee Wee submitted that an invalid decision by the first actor, the Controller, will not result in an ineffective act by the Second Actor, the developer. Sri Damansara obtained and had relied upon the approval of the extension before the SPA was executed. Learned counsel for the appellant contended that an administrative act by a public authority declared void will not invalidate that act done before the declaration. The EOT was granted five months before any SPA was executed. Therefore, the SPAs executed by Sri Damansara and the purchasers are valid. Vacant possession was delivered on 22 December 2015.

[107] It was further argued that both the second and third respondents are strangers and cannot initiate a collateral proceeding by way of the defence and must challenge directly the extension of time granted by the first actor, the Controller. This they failed to do so.

[108] In response to the submission advanced by learned counsel for Sri Damansara, learned counsel for the second and third respondents, Dato KL Wong argued that although an administrative act (the first act) has been declared void in law, it is stiil an act in fact. The mere factual existence of the first act provide foundation for the legal validity of the later decision (the second act).

[109] Learned counsel for the third and third respondents further submitted the question posed for determination presumes a fact that was neither decided by the High Court nor by the Court of Appeal and seems to suggest that an innocent third party had relied on an earlier decision made by the public authority which was subsequently declared ultra vires. There is no finding or decision made by the Tribunal or the High Court or even the Court of Appeal that Sri Damansara is the innocent third party. Furthermore, the issue was not raised at the High Court or the Court of Appeal; neither did the appellant raise this as an issue before the Tribunal.

[110] More importantly it would have the effect of reversing the findings made against Sri Damansara, namely, that the extension of time granted by the Controller pursuant to reg 11(3) of the HDR 1989 had been declared by the Federal Court. Since the Federal Court in *Ang Ming Lee* declared that reg 11(3) is ultra vires, the Controller has no power under the HDA to modify or amend the statutory contract of sale. Sri Damansara cannot by way of collateral proceedings re-argue that the Controller has such power to modify or amend the statutory contract of sale. Learned counsel for the respondents submitted that this can only be done through legislative intervention. To contend that the Controller still retains the power to modify or amend the statutory contract of

sale would be against the Federal Court's decision in *Ang Ming Lee* and would tantamount to usurping the legislative's powers. The EOT granted by the Controller pursuant to reg 11(3) of the HDR 1989 is null and void as it was ultra vires the HDA. Therefore, the Controller has no power to grant any extension of time under reg 11(3). A void decision is strictly speaking, not a decision at all and does not need to be revoked. It is as if the decision had never existed (*Chan Kwai Chun v Lembaga Kelayakan* [2002] 3 MLJ 550; [2002] 3 CLJ 231). There is thus, no necessity to file for judicial review to have it set aside.

[111] We are not persuaded with the argument advanced by learned counsel for the second and third respondents that this court is precluded from considering issues which was not raised in the courts below. Abdul Rahman Sebli FCJ (as His Lordship then was) in *The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors and other appeals* [2020] 4 MLJ 303 made this crystal clear:

> [212] The issue of breach of the rules of natural justice was not a leave question for our determination, nor was it a matter that the Court of Appeal dealt with and decided on. It was for these reasons that learned counsel for the appellants strenuously objected to the issue being raised at the hearing of these appeals but we decided to hear submissions by the parties in view of the general importance of the matter in all the circumstances of the case, including in particular the failure by the majority to consider the issue although vigorously argued by the respondent at the hearing before the Court of Appeal and which the High Court had in fact decided in the respondent's favour.
>
> [213] Recently this court in *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49 reiterated the principle that the courts have untrammelled discretion to allow a question of law to be raised for the first time on appeal, in the interest of justice having regard to the circumstances of the case and where it is appropriate to do so. The only fetter I must add is that the discretion must be exercised very sparingly and in the most suitable of cases, for if it were otherwise the statutorily prescribed procedure for appealing to this court will be rendered nugatory and open to perpetual abuse which in turn will cause uncertainty to the finality of litigation.

[112] What is the Second Actor Theory? It is a principled and practical solution to resolve the question of the validity of a subsequent decision. The validity of the second act will turn upon the proper construction of the act empowering the 'second actor' to do or not to do a specified act. The Second Actor Theory was formulated by Professor Christopher Forsyth in 'The Metaphysic of Nullity' — Invalidity, Conceptual Reasoning and the Rule of Law' (Christopher Forsyth and Ivan Hare (eds) (Clarendon Press, 1998) 159). Professor Forsyth explained:

> ... unlawful administrative acts are void in law. But they clearly exist in fact and they

> often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depend upon the legal powers of the second actor. The crucial issue to be determined is whether the second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.

[113] The theory's intent is to resolve what Forsyth described as the existence of a conundrum of validity of public administrative acts and the presumption of validity. Forsyth further explained that the '... theory of the second actor turns the focus away from the unlawful act and on to the powers of the person who acts believing that the first act is valid. All the difficulties attendant upon seeking some interim validity within the first act are side stepped; and thus, the classic principles of administrative law are reconciled with the effectiveness, in appropriate cases, of acts taken in reliance upon unlawful administrative act'.

[114] In Forsyth's article 'The legal effect of unlawful administrative acts: the theory of the second actor explained' (Amicus Curiae Issue 35 June/July 2001), he further explained the theory. Learned counsel for Sri Damansara, Dato' Lim Chee Wee in his submission summarised the Forsyth theory as follows:

(a) it is in substance a licence permitting an individual to do an act which would otherwise be unlawful;

(b) the administrative act may permit an official to do what is otherwise unlawful;

(c) the administrative act may order an official to do or not to do a certain act; and

(d) an administrative decision which may order an individual to do or not to do a certain thing.

[115] In *R v Wicks* [1997] 2 WLR 876 the accused was charged with breach of a planning 'enforcement notice'. He contested the validity of the notice unsuccessfully on appeal to the Secretary of State, but sought to raise it again as a defence to the charge. The House of Lords held that a true construction of the statutory words 'enforcement notice' meant simply a notice issued by the local planning authority that was normally valid, i.e. the substantive validity of the 'enforcement notice' was not a precondition to the success of the prosecution. Here the first act is the making of the enforcement notice and the second act is Wick's conviction for breach of the notice. Clearly, while the enforcement notice had to exist in fact it did not have to be legally valid in order for a valid conviction to ensue. Thus, here the second actor could act validly

notwithstanding the invalidity of the first act.

[116] However, in *Director of Public Prosecutions v Head* [1959] AC 83 the respondent was charged with having carnal knowledge of a mentally 'defective' girl contrary to s 56(1)(a) of the Mental Deficiency Act 1913, but the certificate of two doctors certifying that the victim was mentally defective and the Secretary of State's order transferring her to an institution were themselves defective. That meant that the certificate and orders were void, yet their validity was fundamental to the offence. The Court of Appeal quashed the conviction and the Director of Public Prosecution's appeal to the House of Lords was dismissed. The validity of the second act depended upon the validity of the first act. In such cases the invalidity of the first act does involve the unravelling of later acts, which rely on the first act's validity. The court concluded that the voidness of the first act does not determine whether the second act is valid. That depends upon the legal powers of the later actor.

[117] In *Boddington v British Transport Police* [1998] 2 WLR 639 (HL), the theory of the second actor as advanced in 'The Metaphysic of Nullity' was commented favourably by Lord Steyn. Lord Steyn accepted 'the reality that an unlawful by-law is a fact and that it may in certain circumstances have legal consequences'. The facts of *Boddington* are summarised as follows. In July 1995, Peter James Boddington was convicted by the stipendiary magistrate for East Sussex of the offence of smoking a cigarette in a railway carriage where smoking was prohibited, contrary to by-law 20 of the British Railways Board's Byelaws 1965 . The by-law was made under s 67 of the Transport Act 1962, as amended. The magistrate fined Mr Boddington £10 and ordered him to pay costs. He appealed by way of case stated to the Divisional Court, which dismissed his appeal. However, the Divisional Court certified two points of law of general public importance arising in the case and granted leave to Mr Boddington to appeal to this House against his conviction. The points of law of general public importance certified by the Divisional Court were essentially whether a defendant could raise as a defence to a criminal charge a contention that a by-law, or an administrative decision made pursuant to powers conferred by it, is ultra vires; and if he could, whether he could succeed only if he could show the by law or administrative decision to be 'bad on its face'.

[118] In *Percy and another v Hall and others* [1997] QB 924 police officers had, without warrant, arrested persons on some 150 occasions. Those arrested were alleged to have infringed by-laws. However, they were later acquitted of the criminal charges against them. The Divisional Court held that the relevant by-laws were invalid for uncertainty. The police officers who had made the arrests were then sued for wrongful arrest and false imprisonment. The defendant police pleaded lawful justification on the basis of their reasonable

belief that the plaintiffs had committed an offence. The Court held that the defence was available notwithstanding that the by-laws were invalid. On appeal the Court of Appeal concluded that the by-laws were valid and that even if the by-laws had been invalid, the plea of lawful justification would have been good. Simon Brown LJ reasoned, that at the time the arrests had been made the bylaws were apparently valid and therefore in law presumed to be valid; in the public interest, moreover, they needed to be enforced:

> It seems to me one thing to accept ... that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have the conviction set aside; quite another to hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constable's duty into what must later be found actionably tortious conduct ... I see no sound policy reason for making innocent constables liable in law, even though such liability would be underwritten by public funds.

[119] In a more recent Supreme Court UK case of *Regina (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2022] AC 461 the court affirmed the doctrine of Second Actor Theory. Majera, a Rwandan national was subject to a deportation order and challenged the Court of Appeal's decision that the purported grant of bail by the Tribunal was void from the very beginning. Majera served a prison sentence for robbery between 17 December 2005 and 30 March 2015. The Tribunal Judge decided that Majera could be released on immigration bail. The issue before the sourt was whether the bail is alleged to be defective due to non-compliance with the Immigration Act 1971. While Majera was in immigration detention, he applied to an immigration judge for bail. Bail was subsequently granted but the immigration judge refused to impose one condition ie Majera is not to be allowed to engage in unpaid employment. Undeterred, and without seeking judicial review of the immigration judge's bail decision, the Home Secretary used its statutory power to impose a restriction on Majera's ability to engage in unpaid employment. Majera then filed an application for judicial review on the basis that the Home Secretary had no authority to circumvent the immigration judge's bail decision. The Home Secretary then sought to argue that the immigration judge's bail decision was void, as it failed to require Majera to appear before an immigration officer, an explicit requirement under the statute. The Supreme Court held that the Home Secretary could not ignore a defective court order because it is long settled law that court orders must be obeyed until set aside.

[120] The Supreme Court however did not embark upon the principle of the 'Second Actor Theory' and only dealt with an order of a court or tribunal, and not a subordinate legislation that had been declared ultra vires by a superior court. Lord Reed in *Majera* stated that it was unnecessary to embark upon a detailed consideration of the legal consequences of administrative

measures which have been held to be unlawful. It is necessary to focus only upon the question whether it is a defence to a challenge to the lawfulness of the Secretary of State's decision, on the basis that it was inconsistent with the order of the First-tier Tribunal, to establish that the order was unlawful.

[121] Even where a court has decided that an act or decision was legally defective, that does not necessarily imply that it must be held to have had no legal effect. As the Court of Appeal correctly noted it may be, in the first place, that to treat the decision as a nullity would be inconsistent with the legislation under which it was made (see, for example, *Regina v Soneji and another* [2006] 1 AC 340; [2005] UKHL 49). Or the result of treating the decision as legally non-existent may be inconsistent with legal certainty or with the public interest in orderly administration: it may, indeed, result in administrative chaos, or expose innocent third parties to legal liabilities (as where they have acted in reliance on the apparent validity of the unlawful decision). In some such circumstances, the act or decision may have some legal effects in accordance with principles of the common law.

[122] In his speech Lord Reed highlighted an observation made by Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] AC 736 in the application of the theory. In *Smith*, Lord Radcliffe considered an argument that an ouster clause preventing a compulsory purchase order from being challenged after the expiry of a time limit must be construed as applying only to orders made in good faith, since an order made in bad faith was a nullity and therefore had no legal existence. Lord Radcliffe observed that an order, even if not made in good faith, is still an act capable of legal consequences. Such an order 'bears no brand of nullity on its forehead'. Unless court proceedings are taken to establish the invalidity/nullity and get it quashed or set aside.

[123] Lord Reed concluded that if an unlawful administrative act or decision is not challenged before a court of competent jurisdiction, or if permission to bring an application for judicial review is refused, the act or decision will remain in effect. He went on further to say that even if an unlawful act or decision is challenged before a court of competent jurisdiction, the court may decline to grant relief in the exercise of its discretion, or for a reason unrelated to the validity of the act or decision. Thus, the act or decision will again remain in effect. An unlawful act or decision cannot therefore be described as void independently of, or prior to, the court's intervention.

[124] The case of *Calvin v Carr* [1980] AC 574 was cited with approval by Lord Reed. In *Calvin*, Lord Wilberforce observed at pp 589–590 that in relation to a contention that an appeal could not lie against a decision which was void, that until a decision was declared to be void by a competent body or court, 'it may have some effect, or existence, in law. Therefore, even when an

act or decision has been declared as being legally defective, that does not necessarily imply that it must be held to have had no legal effect.

[125] To treat the decision as a nullity would be inconsistent with the legislation under which it was made. The legal consequences of treating the decision as legally non-existent may be inconsistent with legal certainty or with the public interest in orderly administration and may to a certain extent result in administrative chaos, or exposing innocent third parties to legal liabilities where they have acted in reliance on the apparent validity of the unlawful decision. Lord Phillips, giving the judgment of the Privy Council, observed in *Mossell (Jamaica) v Office of Utilities Regulations* [2010] UKPC 1:

> There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called 'third actors') during the period before their invalidity is recognised by the court — see, for example, *Percy and another v Hall and others* [1997] QB 924.

[126] Thus, a legally defective act does not necessarily result in the act having no legal effect at all. The court may declare an act to be unlawful but the court may find it necessary in some circumstances to treat the act as having some legal effects. Therefore, even if the court may find the act to be unlawful or legally defective, it does not necessarily imply that it does not have any legal effect. The courts have power to afford legal effect to ultra vires decision for public interest or orderly administration.

[127] In Malaysia, the Second Actor Theory was discussed and applied in *Pan Wai Mei v Sam Weng Yee & Anor* [2006] 2 MLJ 1. The facts of *Pan Wai Mei* are straightforward. It was an action brought by the respondent as plaintiff to obtain vacant possession of a property occupied by the appellant, the first defendant. The first defendant and one Sim Thiam Chong were co-proprietors of a property each owning a one-half share. For purposes of a loan they charged it to Southern Bank Bhd. Unfortunately, they defaulted and Southern Bank commenced an action to recover the loan due. The bank filed an application to the land administrator for an order for sale. On 9 January 2003, the land administrator made an order for sale and directed that the land be sold by public auction. An auction was held and the land was sold to the plaintiff who was the successful bidder. All this happened in 2003. The plaintiff obtained his certificate of proprietorship and was duly registered as proprietor of the property. The plaintiff then brought proceedings in 2004 claiming vacant possession. The defendants did not appear and an order was made against them. The defendants then applied to set aside the order made in default of appearance which was subsequently dismissed by the High Court. On appeal to the Court of Appeal the appellants contended that the land administrator's

order is a nullity. The Court of Appeal observed that in fact neither of the appellants had mounted a challenge that the order for sale or the public auction invalid.

[128] Justice Gopal Sri Ram, Judge of the Court of Appeal (as he then was) eloquently explained the theory and said that the theory has both the merit of logic and judicial support:

> [15] It is to meet such cases as the present that Professor Forsyth of the University of Cambridge has advanced the theory of the second actor (see *The Golden Metwand* by Forsyth & Hare; The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in *Essays on Public Law in Honour of Sir William Wade OC* ed Christopher Forsyth and Ivan Hare (Clarendon Press) 141). The theory is one that has both the merit of logic and judicial support. Professor Forsyth's view on the acts and decisions of public decision-making bodies is as follows:
>
> (i) an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second; and
>
> (ii) But they [the administrative acts] clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.
>
> [16] This theory was commented on favourably by Lord Steyn in *Boddington*'s case where he accepted 'the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr Forsyth who summarised the position in *The Metaphysic of Nullity — Invalidity, Conceptual Reasoning and the Rule of Law,*. The theory has been accepted and acted upon by the Supreme Court of Appeal of South Africa in *Oudekraal Estates (Ptv) Ltd v The City of Cape Town & Ors* [2004] ZASCA 48. In my judgment, it squarely applies to the present instance.
>
> [17] As I have already said, the plaintiff is a stranger to the alleged invalid act. So far as he is concerned, the act of the land administrator in making the order for sale exists as a fact upon which he may and has acted. He has the legal power to act validly despite the alleged invalidity of the land administrator's act because his right to possession arises from his registered proprietorship of the land. The defendant has therefore no ground to resist the plaintiff's claim.
>
> [18] Hence, on the present facts, it was imperative for the defendant to have launched a frontal assault on the act of the Land Administrator and upon the plaintiff's registered title. In the absence of such an attack there is no arguable defence to the plaintiff's claim. And an arguable defence is a *sine qua non* in a case

as this (see *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312). The judge was therefore plainly right when he refused to set aside the order made in the defendant's default.

[129] Back to the instant appeal, the first act was the approval of extension of time by the Controller while the second act was the reliance of the developer on the Controller's extension. The parties had presumed correctly that the Controller's extension was validly granted in 2012. In fact, Sri Damansara delivered the unit within the said period of 42 months as stipulated under the SPA. The complaints of the second and third respondents before the Tribunal are the late delivery of vacant possession and that the payment of LAD should be calculated from the date part payment was made. The High Court found that the date of payment shall be computed from the date of the SPA and the Court of Appeal affirmed the decision of the High Court.

[130] We agree with the arguments advanced that the validity of an administrative action may, in exceptional circumstances, be challenged by way of collateral proceedings. However, in the appeal before us the second and third respondents are in actual fact 'strangers' in the present dispute, and as 'strangers' they are not eligible to collaterally attack the Controller's extension through this proceeding. As explained in *Pan Wai Mei* for a collateral attack against the decision of a public decision maker to succeed, no stranger can be involved in the challenge. The contest was either between the party that did the invalid act and the victim of the act or between two non-strangers one of whom seeks to rely on an invalid act or decision made by public decision-maker. Hence, on the facts of *Pan Wai Mei* it was imperative for the defendant to have launched a frontal assault on the act of the land administrator and upon the plaintiff's registered title. In the absence of such an attack there was no arguable defence to the plaintiff's claim.

[131] In this case before us, the proper parties are the Controller who performed the administrative action and Sri Damansara who relied on the administrative decision. The second and third respondents as the purchasers do not fall within the two categories of parties entitled to initiate collateral proceedings to invalidate the Controller's Extension. Moreover, the Collateral Proceeding can only be used as a defence rather than an attack. In *Pan Wai Mei*, the Court of Appeal ruled that:

> [10] The foregoing general rule is subject to the doctrine of collateral attack. In proceedings brought in reliance of an invalid act or decision, a defendant or an accused may plead the invalidity by way of defence in civil or criminal proceedings.

[132] Hence, the second and third respondents in this case cannot initiate this collateral proceeding, as they are using it as an attack against Sri Damansara (who is the developer and the second actor) as opposed to a defence. There was

no direct challenge against the Controller's decision to grant the extension by way of judicial review. Thus, it shall not render the second act invalid as there is a reliance on validity of the first act when the second act was performed.

[133] We reiterate that we are not in any way or manner departing from *Ang Ming Lee*, neither are we revisiting *Ang Ming Lee*. As (earned counsel for the appellant submitted the application of Second Actor Theory is not to revisit *Ang Ming Lee* but to refine it and to put it in proper context. On the contrary the underlying question calling for consideration in the present appeal is the legal consequences of the aftermath of *Ang Ming Lee.* It is imperative for this court to resolve the legal uncertainties surrounding this issue of the extension of time granted by the Controller plaguing the housing industry in this country. As we have earlier alluded the power of the Minister under the Act and the Regulations remained legally intact notwithstanding the declaration that reg 11(3) of the HDR is ultra vires.

[134] We agree with the submission of learned counsels for the appellants that despite the extension having been declared unlawful and invalid by *Ang Ming Lee*, it should not adversely affect the parties who had relied on that decision or regulation prior to the declaration of invalidity. *Ang Ming Lee* can be described as a placebo to cure the ills that ail the extension granted. However, in this case it is necessary to have a specific antidote to eradicate any negative side effects of *Ang Ming Lee.* What is the antidote that this Court will prescribe? On the authorities we have discussed, where an innocent party had relied on an earlier decision made by a public authority that was subsequently declared ultra vires, the Second Actor Theory is applicable and should be the perfect and preferred antidote.

[135] The developer, in this case Sri Damansara, relied upon the act of granting the extension. There would be substantial injustice if the act of developer is found to be void because of the invalidity of the first act by the Controller. As the second and third respondents did not challenge the validity of the EOT approved by the Controller before the Tribunal, nor did they mount any challenge it in the judicial review proceedings, they cannot therefore initiate a collateral proceeding. The extended period was granted before the SPA was executed and both the respondents were fully aware of the time of completion. Hence, the second and third respondents for the reasons we have alluded are not in the position to initiate a collateral proceeding against Sri Damansara.

[136] The Controller had considered the application for extension and granted the extension as the law at that time was valid. The developer had relied on the decision of the Controller who had granted the extension. Accordingly, we have no difficulty in holding that the Second Actor Theory applies. The

question posed is therefore answered in the affirmative. A

PROSPECTIVE OVERRULING

[137] The Federal Court in *Ang Ming Lee* having ruled that reg 11 of the HDR is ultra vires, did not address or discuss the issue whether such ruling applies prospectively or retrospectively. Nor whether by virtue of the declaration of the reg 11(3) ultra vires, that all extensions granted by the Controller before *Ang Ming Lee* are invalid? Learned counsels for Obata and Vignesh argued that since the Federal Court in *Ang Ming Lee* did not state that its decision has prospective effect it would necessarily mean that the *Ang Ming Lee*'s declaration of invalidity applies retrospectively. B C

[138] The doctrine of prospective overruling originated in the American Judicial System, Cardozo J the creator and propounder of Prospective overruling laid down this doctrine in the case of *Northern Railway v Sunburst Oil and Refining Co* 287 US 358 (1932) where he refused to make the ruling retroactive. Sunburst Oil & Refining Company brought a suit against Great Northern Railway Company to recover payments claimed to be overcharges for freight. The charges were in conformity with a tariff schedule approved by the Railroad Commission of Montana for intrastate traffic. After payment had been made, the Railroad Commission which had approved the schedule held, upon a complaint by the shipper, that the rates approved were excessive and unreasonable. To recover the excess so paid, the shipper recovered a judgment which was affirmed upon appeal. The question before the court was whether the annulment by retroaction of rates valid when exacted is an unlawful taking of property is unconstitutional. D E F

[139] Cardozo J opined that if the doctrine is not given effect it will wash away the whole dynamic nature of law which would be against the concept of judicial activism. The law has to be dynamic to keep up with the changes occurring in the society: G

> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed, there are cases intimating, too broadly (cf *Tidal Oil Co v Flanagan*, supra), that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted. H I
>
> ... On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning.

[140] Justice Cardoza further articulated:

> ... The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that, with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions, we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew.

[141] In India the doctrine of prospective overruling was discussed and adopted in the case of *IC Golaknath & Ors v State of Punjab & Anr* 1967 AIR 1643 and it has been applied in many case laws. In the *Golaknath*'s case the court defined the doctrine of overruling as being:

> ... a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisi but confines it to past transactions. While in strict theory it may be said that the doctrine involves the making of law, what the court really does is to declare the law but refuse to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds the law and that it does make law and it finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting, its errors without disturbing the impact of those errors on past transactions. By the application of this doctrine the past may be preserved and the future protected. Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling.

[142] The court in *Golaknath* also had laid down certain rules or guidelines restricting the application of the doctrine in the Indian system:

(a) the doctrine of prospective overruling can be invoked only in matters arising under the Indian Constitution; and

(b) it can be applied only by highest court of the country, ie only the Supreme Court can declare law binding on all the courts as it has in India:

> (3) the scope of the retrospective operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with-the justice of the cause or matter before it.

[143] In *Sarwan Kumar & Anr v Madan Lal Aggarwal* 2003 AIR SCW 819 the Supreme Court defined prospective overruling as:

> ... the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal

would otherwise work hardship to those who had trusted to its existence. A

[144] It is said that the prospective declaration of law is a device innovated by the apex court to avoid reopening of the settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of the prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this court are also duty bound to apply such cases which would arise in future only. B C

[145] It was held in *Golaknath* that this doctrine can only be invoked in matters arising under the Constitution and can be applied only by the Supreme Court in its discretion in accordance with the justice of the cause or matter before it. But it has now been held that application of the doctrine of prospective overruling has been extended to the interpretation of the ordinary statutes as well. D

[146] The basic objective of prospective overruling is to overrule a precedent without having a retrospective effect. Retrospective invalidation of governmental acts may have far reaching consequences especially when many parties have relied on the act and there are financial considerations and consequences involved. E F

[147] In *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209; [2005] UKHL 41 the House of Lords through the judgment of Lord Nicholls of Birkenhead discussed the application of prospective overruling and highlighted the basic features of the judicial system. The role of the courts is to decide the legal consequences of past happenings. The courts make findings on disputed questions of fact, identify and apply the relevant law to the findings of facts and award the appropriate remedies. The second feature is the effect of a court decision on a point of law. In order to ensure a degree of consistency and certainty about the present state of the law the courts in the UK adopted the practice of treating decisions on a point of law as being the precedents for the future i.e. the principle of stare decisis, if in the event similar issue of law arises in another case a court will treat a previous decision as binding or persuasive. His Lordship explained that the third feature is that: 'From time to time court decisions on points of law represent a change in what until then the law in question was generally thought to be. This happens when a court departs from, or an appellate court overrules, a previous decision on the same point of law. The point of law may involve the interpretation of a statute or it may relate to a principle of 'judge-made' law, that is, the common law. A change of this nature does not always involve G H I

departing from or overruling a previous court decision. There are times when a court may give a statute, until then free from judicial interpretation, a different meaning from that commonly held'.

[148] The fourth feature is a consequence of the second and third features:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Ms Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.

[149] The House of Lords further explained that prospective overruling takes several forms:

> In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling. Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme.

[150] The House of Lords in *Spectrum* did not apply the doctrine of prospective overruling but said that prospective overruling may be necessary in certain circumstances to administer justice fairly:

> [40] Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for

> past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.
>
> [41] If, altogether exceptionally, the House as the country's supreme court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the judiciary under this country's constitution. Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times. 'Never say never' is a wise judicial precept, in the interest of all citizens of the country.

[151] Lord Nicholls said that judges had been described as 'developing' the law for some time when making novel decisions, and that judges are not free to repeal laws or distance themselves from bad laws; their only power is to impose a new interpretation. His Lordship held that in exceptional cases, it would be open to the court to hold that a new interpretation of the law should be applied only prospectively:

> But, even in respect of statute law, they do not lead to the conclusion that prospective overruling can never be justified as a proper exercise of judicial power. In this country the established practice of judicial precedent derives from the common law. Constitutionally the judges have power to modify this practice.

[152] What can be discerned from the House of Lords 'decision in *Re Spectrum* is that there can be exceptional circumstances where it is necessary in the interest of justice that the decision of the court must be prospective.

[153] The Canadian Supreme Court in *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 addressed the subject of retrospectivity of laws and its judgment said:

> People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.

[154] Consistent with the approach in the United Kingdom and Canada this court in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* had stated that where it concerns the construction or interpretation of statue, a statue should not be interpreted retrospectively to impair an existing right or obligation:

> [5] ... Still, we could take this opportunity to uphold that it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute (*Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 per Lord Brightman, delivering the advice of the Board).
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> [6] In *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99, p 106 Gunn Chit Tuan CJ (Malaya) said:
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> > On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v Moore* [1992] 1 All ER 880 at p 891:
> >
> > > ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset...
> >
> > Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 MLJ 1 at p 2:
> >
> > > A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability, in regard to events already past.
>
> [7] If it takes away a substantive right, the amendment will not have retrospective effect save by clear and express words. If it is procedural, retrospectivity applies unless otherwise stated in the statute concerned (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 per Steve Shim CJ (Sabah & Sarawak). If the Legislature intends an amendment to have retrospective application, it must expressly and clearly say so (see *Puncakdana Sdn Bhd v Tribunal for Housebuyers Claims and another application* [2003] 4 MLJ 9 per Md Raus J, as he then was).

[155] Prospective overruling and retrospectivity have been discussed and applied in many cases decided by the Federal Court. In *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 retrospective application of a decision of the Federal Court case was discussed. In *Letchumanan* the main issue for the court's determination is the standard of proof in a civil claim when fraud is alleged. The Federal Court in *Letchumanan* considered whether the principles enunciated in *Sinnaiyah & Sons Sdn Bhd v*

Damai Setia Sdn Bhd [2015] 5 MLJ 1 where it was held 'that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply ... in the absence of a statutory provision. With respect to whether prospective overruling applies in *Letchumanan*, Jeffery Tan FCJ said:

> [88] In Malaysia, the doctrine of prospective overruling had been applied in criminal cases and in an application that pertained to a court circular on auction sale (*Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)* [1995] 2 MLJ 421). In *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, it was held by the former Supreme Court (majority) thats s 418A of the Criminal Procedure Code was unconstitutional and void as being an infringement of the provisions of art 121(1) of the Federal Constitution and that the doctrine of prospective overruling would be applied so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions and acquittals which had taken place under the section prior to the date of that judgment would remain undisturbed and not be affected. In *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, it was declared by the former Supreme Court (majority) that s 298A of the Penal Code was invalid and therefore null and void and of no effect but that the declaration would not apply to the Federal Territories of Kuala Lumpur and Labuan and would take effect from the date of the order, that is 13 October 1987. In *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681, the Court of Appeal, per Gopal Sri Ram JCA (as he then) was, delivering the judgment of the court, declared both s 129(2) of the Securities Industry Act 1983 and s 39(2) of the Securities Commission Malaysia Act 1993 to be unconstitutional, null and void, but the declaration was prospective only, to include that case and cases registered from the date of the declaration.
>
> [89] Prospective overruling had been applied in Malaysia. But was it applied in *Sinnaiyah*, such that it had no retrospective effect, even to the instant appeal from a decision decided by the trial court before the change in the law? 'It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect' (*Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). The law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the ... decision was overruled' (*Kleinwort Benson Ltd*). 'Because of the doctrine of precedent, the same would be true of everyone else whose obligations would be decided according to the law as enunciated ... even though the relevant events occurred before that decision was given' (Lord Nicholl's fourth 'feature' in the judicial system, see also *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, where it was held by the court per Gopal Sri Ram JCA, (as he then was), delivering the judgment of the court, that the Court of Appeal was bound to follow *Muhammed bin Hassan*, notwithstanding that the conviction was handed down before the change in the law). The law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded (*Cadder v Her Majesty's Advocate* per Lord Hope) and to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is

> excluded from cases already finally determined (*Cadder v Her Majesty's Advocate* per Lord Rodger). That is the common law position. There was no departure in *Sinnaiyah* from the common law position when the court said 'we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims. The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases which have reached a terminal end. The ruling in *Sinnaiyah* was not in the prospective only form. *Sinnaiyah* applies to all cases that have not been finally determined, including all pending appeals, except that in the instant appeal, it does not matter.

[156] It is necessary to highlight that the facts and the laws applicable in both *Letchumanan* and *Sinnaiyah* are distinguishable from the appeals before us. The issue before this Court in both *Letchumanan* and *Sinnaiyah* involved fraud and forgery in land transactions in civil claims and the applicable standard of proof.

[157] This court in *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273 had also addressed the issue of retrospectivity and prospective overruling. In *Busing* the questions of law for the court's determination were related to the decision of the Federal Court in the case of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 and the decision of the Federal Court in the case of *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 and the decision of the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor snak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 vis a vis the 2018 amendments to the Sarawak Land Code. Tan Sri Abang Iskandar Abang Hashim CJ (Sabah and Sarawak) (as His Lordship then was) delivering the judgment of the Federal Court said:

> [141] It is trite legal principle that a legislative change in a statute is not intended to have a retrospective effect 'unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction (*Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311).
>
> [142] In fact, there is, at common law, a general rule 'that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events (Sir Owen Dixon CJ in *Maxwell v Murphy* [2022] 2 MLJ 273 at 318; (1957) 96 CLR 261).

[158] In *Busing*, the Federal Court had to determine whether the 2018 amendment to the Sarawak Land Code, in respect of the issues on *Pemakai Menoa* and *Pulau Galau*; and deferred indefeasibility of provisional lease; and the effect of the amendment to the appeals before it. The Federal Court concluded that the current regime of the statutory law must be complied with not only to cases which are yet to be filed with the courts, but also to all pending cases and all those cases still under appeals within our court system.

[159] *Busing* and the appeals before us are distinguishable on the facts and the law in that in *Busing* there was an amendment to the statute whereas in the appeals before us the declaration by this court that the regulation is ultra vires the Act.

[160] In *Ang Ming Lee* this Court declared that reg 11(3) of the HDR ultra vires the HDA, and thus, the extension granted by the Controller was invalid. *Ang Ming Lee*, however, is silent as to whether the effect of declaring reg 11(3) of the HDR ultra vires would apply retrospectively or prospectively. This means that any extension granted by the Controller would be invalid prior to *Ang Ming Lee* and house buyers would be entitled to LAD to be calculated up to *Ang Ming Lee* notwithstanding the fact that they may have been paid LAD and vacant possession have been delivered. This cannot be so, as it will result in substantive injustice as it will impair the rights of the parties involved. At the time the extension was granted the law, that is reg 11(3) of the HDR was valid and reliance was placed based not only on the statutory regime at that time allowing such extension to be granted and extending the prescribed 36 months completion period but also the terms of the executed SPAs were based on the approved extension as required by the law.

[161] Learned counsels for Obata and Vignesh, Dato KL Wong and Dato Low Joo Hean submitted at length that the courts' role is only to interpret the law and as such may not be permitted to impose prospective effect of any ruling akin to legislative's act of making law and in any event, they are not permitted to violate the equal protection principle that transcends adjudicative jurisprudence in all the common law courts. The prospective overruling referred to in the various authorities are pronouncements which are consistent with retrospective effect of the decisions. Therefore, since these appeals had been filed after *Ang Ming Lee* was decided, there is no infringement of the doctrine even if the principle is applied herein.

[162] Learned counsels further argued that it is now too late to retrospectively impose prospective effect to *Ang Ming Lee* as the rights under art 8 of the Federal Constitution of the appellant and many plaintiffs whose cases are pending in various courts will be violated as just like *Ang Ming Lee* who suffered the illegal act of the controller by virtue of the illegal extension of

time to the developer prior to the decision in *Ang Ming Lee*, the appellant and most of the plaintiffs whose cases are pending in various courts suffered also illegal extension of time granted by the controller prior to decision of *Ang Ming Lee.*

[163] We are not persuaded with the arguments advanced by learned counsels for Obata and Vignesh. The exception as enunciated in *Re Spectrum* suggested the application prospective overruling is an ideal resolution such that any changes in the law will not affect any causes of action in respect of extension of time and LAD arising prior to *Ang Ming Lee.* The court may, after having considered the justice of the case and in exceptional circumstances must be prepared to hold that a new interpretation of the law should be applied only prospectively. The declaration of ultra vires and invalidity in *Ang Ming Lee* cannot be interpreted as giving an opportunity to all that have benefited prior to *Ang Ming Lee* to enjoy further financial gains.

[164] The statutory regime at the time when extension was applied and granted was valid. As we have stated above great reliance was placed by both the developers and controller that the authority exists. The Minister was empowered to delegate the power to grant extension to the controller. Furthermore, the parties, that is, the developers and the purchasers had relied and accepted the terms of the SPAs where the extended completion period approved by the Controller had been expressly provided. Parties are bound by the terms of the contract and cannot rewrite the terms which they have accepted and from which they have benefitted.

[165] As submitted by learned senior federal counsel, Liew Horng Bin, amicus curiae, a retrospective invalidation of a legislation undermines legal certainty and predictability. Unless there is exceptional public interest requiring retrospective application, an order invalidating a legislation should only take effect prospectively. The invalidation of a legislation or any provision of the legislation would have serious ramifications and implications on those who would have relied on its validity in the past. There will not only be potential administrative chaos but commercial chaos affecting the housing industry which may affect house buyers as well. In *Boddington v British Transport* Lord Browne-Wilkinson opined that:

> ... he was far from satisfied that an ultra vires act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity.

[166] Therefore, a careful consideration of the reliance interest is not only

necessary but critical. Undoubtedly, laws must be given their full force and effect until they are declared invalid. An administrative decision made pursuant to a valid legislation before it is declared as does not mean that the decision was void ab initio. It remains validly and legally intact.

[167] We have given our utmost consideration on the facts and the law and we are of the view that if *Ang Ming Lee* is to have retrospective effect there would be serious ramifications and repercussions to the housing developers that had placed reliance on the existing law and diligently complied with the laws which were at that time valid.

[168] Therefore, based on the reasons we have stated above and the exceptional circumstances involved, the decision of *Ang Ming Lee* is prospective. To say otherwise that *Ang Ming Lee* applies retrospectively will result in great injustice and devastating consequences to the housing industry that had diligently complied with the laws before *Ang Ming Lee.* Thus, the principles enunciated in *Ang Ming Lee* will not apply to extensions granted by the Controller before *Ang Ming Lee.*

[169] In respect of prospective overruling we answered as follows:

Question 1:

Does the doctrine of prospective overruling and the exceptions set out in *Re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 ('Spectrum Plus') apply to Malaysian cases where a court's decision and/or judicial pronouncement would bring disruptive consequences to an industry as a whole?

Answer: *Affirmative*

Question 2:

Does the reliance test (the greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling) apply to Malaysian cases where great reliance was placed on a statutory regime?

Answer: *Affirmative*

UNJUST ENRICHMENT

[170] We now turn to the arguments in respect of unjust enrichment claims. The HDA and the regulations made thereunder are social legislations

with the paramount intention to protect the interest of purchasers. In order to achieve and fulfil this housing developers must be regulated to ensure that house buyers are at all times protected from unscrupulous developers who had promised to deliver their dream houses purchased within the time as stipulated in the SPA. Unfortunately, before the requirement of approved extension there were incidents where housing developers had extended the period of completion beyond the time expressly stipulated without any notice to the purchasers and some developers even extended the time of completion and delivery of vacant possession ad infinitum resulting in abandoned projects.

[171] In its wisdom the Legislature enacted the HDA and the Minister in charge of Housing and Local Government made the Regulations pursuant to the HDA prescribing the standard form of agreement and the requirement for approval before any changes could be made to the prescribed agreement. Until *Ang Ming Lee,* approval was mandatory before any amendments or variations could be implemented. Some applications were allowed and some were not. This was to ensure that any extended time of completion will be regulated and monitored to ensure that housing developers will deliver vacant possession. In the appeals before us the developers had sought for approval prior to executing the SPAs.

[172] The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 recognised the principle of unjust enrichment under Malaysian law. Through the judgment of Azahar Mohamed FCJ (as he then was) His Lordship eloquently explained the determinative principles to be applied:

> [117] The above passages from the judgments of the House of Lords are instructive and are significant contribution to the development of law of unjust enrichment. The principle underlying the cases of *Banque Financiere de la Cite v Pare (Battersea) Ltd* and *Sempra Metals Ltd (formerly Metallgeseilschaft Ltd) v IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:
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> (a) the plaintiff must have been enriched;
>
> (b) the enrichment must be gained at the defendant's expense;
>
> (c) that the retention of the benefit by the plaintiff was unjust; and
>
> (d) there must be no defence available to extinguish or reduce the plaintiffs liability to make restitution.
>
> [118] Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229 and in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59. Nevertheless, it has to be said that despite the increase in judicial reference to the

expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled 'An Introduction to the Law of Unjust ultra vires Enrichment' [2013] 5 MLJ i by Alvin W-L See). In our view, the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.

[119] Applying those principles, we now turn to consider whether the defendant has made out a cause of action in unjust enrichment: the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, that the plaintiff's enrichment at the defendant's expense was unjust, and whether there are any special defences to the claim.

[173] Have the purchasers/house buyers benefitted pre-*Ang Ming Lee*? In this regard it is important to keep in mind of the facts that the purchasers, Obata and Vignesh had agreed to the extended completion period in the respective SPAs, vacant possession was delivered and LAD fully paid by the developer and they have accepted the LAD payment as full and final settlement. They did not suffer any losses. No doubt there was a delay but they have benefited from the approved extended time of completion; the certainty of payment of LAD and the delivery of vacant possession of the property that they had purchased. If the appeals are decided in favour of the purchasers it would result in unjust enrichment at the expense of the developers, in these appeals, Prema.

[174] In *Dream Property* the Federal Court said that the most important question to ask is whether it is unjust for the plaintiff to retain the benefit and considered both the English approach and the civilian approach:

[128] The English approach to the unjust question is to ascertain an unjust factor such as, for example, mistake or failure of consideration. This differs with the civilian approach to the unjust question which consider whether there is a lack of juristic basis. *Goff & Jones on The Law of Unjust Enrichment,* para 1–11, explained these two approaches as follows:

> Many civilian and mixed law systems have a law of unjustified enrichment, under which a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense and that there was no legal ground for the defendant's enrichment. Under these systems a defendant can escape restitutionary liability by showing that there was a legal ground for his enrichment, for example because the claimant was required to benefit the defendant by statute or by contract. The reason why there is no liability in these circumstances is that the defendant's enrichment is not unjustified and so the claimant has no prima facie right to restitution.
>
> The English law of unjust enrichment frequently produces the same results as the law of civilian and mixed law systems, but it works in a different way. Under English law, a claimant will be entitled to restitution if he can show that a

A defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. For example, a claimant will have a prima facie right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or on a basis that fails. Nevertheless, the defendant can escape liability if another legal rule entitles him to keep the benefit, and this rule
B overrides the rule generated by the law of unjust enrichment which entitles the overrides the rule generated by the law of unjust enrichment which entitles the defendant to restitution. For example, a claimant may have paid money to a defendant by mistake, but even so, the payment may be irrecoverable if the claimant was required to pay the money by a statute or by a contract previously
C entered by the parties. Although the claimant would otherwise have a claim in unjust enrichment, the defendant's enrichment is justified by the statute or contract.

[129] We would adopt 'the absence of basis' (to borrow the term used by *Goff & Jones on The Law of Unjust Enrichment* para 1–19) approach of the civilian and
D mixed law systems for the reason that, in our view, it would produce a fairer outcome. Applying this approach, the plaintiff can escape restitutionary liability by showing that there was a legal ground for receiving an enormously enhanced and improved asset in the form of the business of a shopping mall. The important point to note here is that the defendant was not required to benefit the plaintiff by
E legislations or by contract. In our judgment the reason why there is liability in these circumstances is that the plaintiff's enrichment is unjustified and that there is no legal ground for the plaintiff to claim and enjoy the full commercial value of the mall. Therefore, the defendant has a prima facie right to restitution.

F **[175]** On the factual matrix of the appeals before us and guided by the principles as enunciated in *Dream Property*, in our judgment the purchasers as house buyers were fully aware of the terms of SPAs with the extended period with no objection, and had benefited as vacant possession delivered and, LAD payment was accepted. The developers complied with the provisions of the law
G at that time and had not acted in any way unconscionably to the detriment of the interest of the purchasers. It was only after *Ang Ming Lee* that the claims were filed years after delivery of vacant possession and payment of LAD. *Ang Ming Lee* is not a *carte blanche* for purchasers to claim LAD retrospectively and
H to enjoy financial windfall.

[176] In the same vein, the same principles apply to Sri Damansara. The second and third respondents shall not be entitled to remedies due to inequitable conduct of unconscionability, unjust enrichment and estoppel. As
I we have stated above and we wish to reiterate that on the facts both the second and third respondents were fully aware of the stipulated extended period and did not challenge the validity of that extension approved by the Controller before the Tribunal nor before the judicial review at the High Court, only raising at the Court of Appeal.

[177] Applying the principles as enunciated in *Dream Property* on the factual matrix of the appeals before us there would be unjust enrichment. In our judgment there would be injustice if the claims for LAD are allowed to be calculated retrospectively. The purchasers would be unjustly enriched if the claims are allowed.

CONCLUSION

[178] We have considered the competing submissions of counsels before us, read all the authorities cited during argument and based on all the above mentioned reasonings, our unanimous decisions are as follows:

(a) Appeal Nos 02(i)-70–08 of 2022 (W) and 02(i)-71–08 of 2022 (W) where the appellant is Obata-Ambak, the appeals are dismissed. The judgment of the Court of Appeal and the High Court are affirmed;

(b) Appeals Nos 02(i)-72–08 of 2022 (W) and 02(i)-74–08 of 2022 (W) where the appellant is Prema Bonanza, the appeals are allowed. The judgment of the Court of Appeal is set aside and the judgment of the High Court is reinstated; and

(c) Appeal No 01(f)-1–01 of 2023 where the appellant is Sri Damansara, the appeal is allowed. The judgments of the Court of Appeal and the High Court are set aside.

Since these are appeals involving public interest we are of the view that there should be no order as to costs for all the appeals.

[179] My learned brother Justice Abang Iskandar Abang Hashim PCA, my learned sister, Justice Zabariah Yusuf and my learned brothers, Justice Harmindar Singh Dhaliwal and Justice Abdul Karim Abdul Jalil have read the judgment in draft and have expressed their agreement with it.

Appeal Nos 70 and 71 dismissed; and Appeal Nos 72 and 74 and Sri Damansara's appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh